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No. 04-413

In The

Supreme Court of the United States

THE CITY OF ALBUQUERQUE,
a municipal corporation, *et al.*,

Petitioners,

v.

RICK HOMANS and SANDER RUE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

BRENDA WRIGHT
Counsel of Record
LISA J. DANETZ
JOHN C. BONIFAZ
NATIONAL VOTING RIGHTS INSTITUTE
27 School Street, Suite 500
Boston, MA 02108
(617) 624-3900

ROBERT M. WHITE
City Attorney,
City of Albuquerque
RANDY M. AUTIO
Deputy City Attorney,
City of Albuquerque
P.O. Box 2248
Albuquerque, NM 87103
(505) 768-4500

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Did the Tenth Circuit erroneously conclude, in conflict with the Second Circuit, that *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), precludes the constitutionality of Albuquerque's limits on candidate campaign spending in municipal elections, even though the spending limits are justified by new factual circumstances and compelling governmental interests not addressed by the Court 28 years ago in *Buckley*?

2. If the Tenth Circuit correctly read *Buckley* to hold that any limit on campaign spending is *per se* unconstitutional under the First Amendment, should the Court revisit its holding in *Buckley* to permit a showing that Albuquerque's campaign expenditure limits satisfy constitutional requirements?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties were defendants below and are petitioners here:

In *City of Albuquerque v. Homans*:

Judy N. Chavez, in her capacity as Clerk of The City of Albuquerque

In *City of Albuquerque v. Rue*:

Judy N. Chavez, in her capacity as Clerk of the City of Albuquerque, and The City of Albuquerque Board of Ethics and Campaign Practices, a Board of the City of Albuquerque

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App. 1) is reported at 366 F.3d 900 (10th Cir. 2004). The opinion of the District Court in *Homans v. City of Albuquerque* (App. 42) is reported at 217 F. Supp. 2d 1197 (D. N.M. 2002). The opinion of the District Court in *Rue v. City of Albuquerque* (App. 63) is unpublished.

STATEMENT OF JURISDICTION

The Court of Appeals for the Tenth Circuit entered judgment on April 27, 2004. A petition for rehearing or rehearing en banc was denied on May 25, 2004. App. 68. Justice Breyer granted petitioners' request for an extension of time to file a petition for writ of certiorari to and including September 22, 2004 (No. 04A104). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech . . ."

The pertinent provisions of the City of Albuquerque's election code, Article XIII, § 4(d)(1) and (2), Albuquerque City Charter, are reprinted in the Appendix at App. 70.

STATEMENT OF THE CASE

These two cases present an issue of critical importance to the governance of The City of Albuquerque, and one of profound national importance as well: whether state and local governments may employ reasonable limits on

candidates' campaign spending to protect the integrity of their elections and their governments. The Tenth Circuit majority resolved this issue by concluding that *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), forecloses the possibility that such limits could be justified by compelling governmental interests. The Tenth and Second Circuits have split on this critical issue; the Second Circuit has held that campaign expenditure limits may satisfy First Amendment strict scrutiny based on factual circumstances and compelling governmental interests not addressed in *Buckley*. *Landell v. Sorrell*, No. 00-9159(L), 2004 WL 1837394 (2d Cir. Aug. 18, 2004), *petition for rehearing en banc filed* (2d Cir. Sept. 1, 2004).

I. Factual Background

The City of Albuquerque adopted limits on contributions to and spending by candidates for city office through an amendment to the city charter in 1974, which Albuquerque voters approved by a vote of over 90%. App. 3. In 1999, pursuant to an amendment to the City Election Code, the applicable spending limits were doubled to an amount equal to twice the annual salary of the office. App. 48. The spending limits applicable to the October 2, 2001 elections for mayor and city councilor – the races at issue here – were $174,720 and $17,059, respectively. App. 4.

Albuquerque's spending limits have served the City well in deterring the appearance of corruption and promoting public confidence in the integrity of City government. Survey research showed that, by a margin of over 2-1 (68%), voters believe the spending limits have improved the honesty and integrity of city elections. Homans App.

352.[1] Fifty-seven percent of City voters strongly believe that elections for federal office (in which spending is unlimited) are overly influenced by special interest money, while only 23% say the same of City elections. App. 50. On the other hand, if spending limits are removed, the great majority of voters (59%) say that they will have "less faith in the integrity of the election process in Albuquerque." Homans App. 353.

The nation's experience with federal elections since 1976 demonstrates that the voters' distrust of a political system driven by unlimited campaign spending is well-founded. Since this Court's decision in *Buckley*, congressional elections have been conducted subject to limits on individual contributions to candidates but no limits on candidate spending. As found by the *Homans* District Court, limits on contributions alone, without limits on candidates' overall spending, have been ineffective in deterring the appearance and reality of corruption and undue influence in federal elections in the 28 years since *Buckley*. App. 51. The absence of spending limits in congressional elections has resulted in an "arms race" mentality in which each candidate feels compelled to raise the maximum amount possible to forestall the possibility of being outspent. Homans App. 206, 214. A regime of unlimited spending leads to practices such as "bundling," which render contribution limits alone insufficient to deter the corrupting influence of special interest money. App. 51.[2]

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[1] References to "Homans App." or "Rue App." are to the Defendants-Appellants' Appendix in the Court of Appeals.

[2] State Senator Dede Feldman, who had experience running both in Albuquerque elections (where spending has been limited) and state legislative elections (where it has not), testified that "unlimited spending in campaigns for state legislature has made a difference in

(Continued on following page)

The record further demonstrated that, when campaign spending is unlimited, fundraising becomes a full-time job for candidates and officeholders fearful of being outmatched by an opponent's spending. "As the cost of elections rise, candidates for office at every level of federal, state and city government are under a great deal of pressure to engage in fundraising activities and to depend on the good will of their donors." App. 49 (*Homans* district court opinion); *see* Homans App. 473-482 (interviews with former members of Congress describing how demands of unlimited fundraising draw time and attention of members of Congress away from their duties as legislators); Homans App. 212-213 (not unusual for members of Congress to attend three or four fundraising events a night during peak fundraising season).

Unfortunately, with the court-ordered suspension of the City's spending limits shortly before the 2001 election, the same preoccupation with fundraising emerged in Albuquerque. Jim Baca, then the Mayor of Albuquerque, stated: "As a result of this new money chase in this year's mayoral election in Albuquerque, I am now forced to spend three hours every day making fundraising phone calls. I have never before had to do this in my political career." (Homans App. 512).

While protecting the City's elections from the corrosive effects of unlimited campaign spending for over a quarter-century, Albuquerque's spending limits have not prevented candidates from running vigorous, effective

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decisions made in the state legislature. . . . You can see this influence with the alcohol and gambling industries." Rue App. 0710. In city elections, on the other hand, "[h]aving spending limits in place has constrained the really big contributors, like the developers and the big vested interests, from having undue influence on the City Council." *Id.*

campaigns for office in Albuquerque. Homans App. 316-320, 325 (expert report of Anthony Gierzynski); Rue App. 701, 705, 707-708, 716, 721-722 (declarations of council candidates). On every measure of the health of an electoral system – whether it be voter confidence in government, competitiveness of elections, ability of challengers to take on incumbents, extent of voter turnout, or participation of small donors – Albuquerque measures well.[3]

II. Proceedings Below

A. *Homans* District Court Proceedings. Rick Homans, a candidate for mayor in the 2001 mayoral election, filed suit on August 10, 2001, alleging that Albuquerque's limit on candidates' campaign expenditures in mayoral elections violated his rights under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. He subsequently sought, and the district court granted, a motion for a temporary restraining order. He also filed a motion for a preliminary injunction, seeking to enjoin enforcement of the spending limit for the upcoming October 2001 mayoral election. After a hearing at which the City presented extensive evidence in support of the spending limit, the district court denied the motion in a decision and order dated September 1, 2001, finding that Albuquerque's mayoral spending

[3] Undisputed evidence establishes that Albuquerque mayoral elections have been far more competitive, and challengers have been far more successful against incumbents, than is true of mayoral elections in other cities without spending limits. App. 48. *See also* Homans App. 318-319, Rue App. 441-443 (voter turnout in Albuquerque mayoral and city council elections healthy compared to other cities); Homans App. 234-237 (small donors play much bigger role in campaign financing in Albuquerque than in comparable city without spending limits).

limit was narrowly tailored to serve compelling governmental interests. *See Homans v. City of Albuquerque*, 160 F. Supp. 2d 1266 (D. N.M. 2001).

A motions panel of the Court of Appeals granted Homans' request for an injunction pending appeal on September 6, 2001. *Homans v. City of Albuquerque*, 264 F.3d 1240 (10th Cir. 2001). The parties subsequently submitted the case to the district court for a ruling on the merits on the record compiled at the preliminary injunction hearing, together with additional evidence submitted by stipulation.

On August 22, 2002, the district court entered findings of fact and conclusions of law. App. 42. The court found that the City's spending limits

> are narrowly tailored to serve the compelling interests of deterring corruption and the appearance of corruption, promoting public confidence in government, permitting candidates and officeholders to spend less time fundraising and more time performing their duties as representatives and interacting with voters, increasing voter interest in and connection to the electoral system, and promoting an open and robust public debate by encouraging electoral competition.

Despite these findings, the district court entered judgment in favor of Homans' First Amendment claim, granting a permanent injunction against further enforcement of the spending limit. App. 61-62. The district court viewed the Tenth Circuit ruling granting an interlocutory injunction to Homans as precluding any other determination. App. 61.

B. *Rue* District Court Proceedings. Following completion of the preliminary injunction proceedings in *Homans*, respondent Sander Rue, a candidate for city

councilor, filed suit on September 6, 2001, alleging that the limit on campaign expenditures in city council races violated his rights under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

Following discovery, the district court granted Rue's motion for summary judgment on October 11, 2002. App. 63. The district court's decision did not discuss the factual evidence submitted by the parties, holding that the constitutionality of the spending limit was foreclosed as a matter of law by the decision of the Tenth Circuit granting an injunction pending appeal to *Homans*, and by the *Homans* district court's subsequent final judgment. App. 66-67.

C. The Tenth Circuit's Decision. The Court of Appeals consolidated the two cases for purposes of argument and decision, and affirmed. App. 1-41. Judge Lucero wrote the opinion of the court as to parts I, II, and III, which addressed only procedural issues and the standard of review. App. 1-9. He addressed the merits in Part IV. App. 9-27. Judge Tymkovich wrote a separate opinion addressing the merits, which was joined by Judge O'Brien. App. 27-42. Judge Tymkovich's opinion thus constitutes the majority opinion on the merits of the constitutional issue before the court, despite being styled as a concurrence.

Judge Tymkovich's opinion (hereafter referred to as the majority opinion) viewed *Buckley* as an absolute bar to spending limits regardless of the factual circumstances and legal interests supporting the limits. As the majority stated, "under *Buckley* such restrictions cannot be supported

as a matter of law." App. 28.[4] The majority held that neither the interest in deterring corruption and its appearance, the interest in protecting the time of officeholders and candidates from the burdens of fundraising, nor the interest in encouraging a robust debate of the issues through electoral competition could provide a legally sufficient basis for expenditure limits. App. 34, 36, 40.

The third member of the panel, Judge Lucero, would have held that the interests identified by the City could provide a sufficient basis for the limits. App. 14. ("*Buckley* does not preclude the use of expenditure limits to further a state's anti-corruption interest in all circumstances"); App. 22 (*Buckley* did not address the "wholly separate" interest in preserving officeholders' time); App. 26 ("nothing precludes this court from recognizing robust electoral competition as a state interest sufficiently compelling to justify the expenditure limits").

Judge Lucero concluded, however, that the City's factual evidence was insufficient to document these interests. App. 26. Because the *Rue* case was decided on a motion for summary judgment, without a trial or factual findings by the district court, Judge Lucero acknowledged that the evidence should be viewed "in the light most favorable to the City." App. 6. Judge Lucero nevertheless

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[4] Elsewhere, the majority opinion states: "I agree that the *Buckley* Court did not adopt a *per se* rule against spending limits." App. 30. Nevertheless, the majority's analysis of the issues clearly demonstrates that it rejected, as a matter of law, the possibility that spending limits could be sustained under the First Amendment. After noting the governmental interests on which the City relied to support its expenditure limits, the opinion states: "Since all . . . of the asserted interests are thus constitutionally incapable of justifying spending restrictions as a matter of law, the court need not entertain the evidence submitted by the City." App. 28.

proceeded to weigh conflicting evidence in the record in concluding that the City's evidence was insufficient to demonstrate the constitutionality of the city council expenditure limit. App. 23 (noting conflict in evidence concerning effect of unlimited spending on officeholders' time); App. 19 (noting conflict in evidence concerning implications of survey results).

Although the record in the *Homans* case differs in certain respects from that in the *Rue* case,[5] Judge Lucero concluded that separate consideration of the *Homans* record was unnecessary. App. 26. He reasoned that *Homans* was not decided on a motion for summary judgment and the standard of review would be less favorable to the City in *Homans* than in *Rue*. *Id.* Accordingly, he did not separately address the evidence in *Homans* or the factual findings of the *Homans* district court.

REASONS FOR GRANTING THE WRIT

These cases present a constitutional question of exceptional importance to local governments and to the state of American democracy, on which Courts of Appeals for different circuits have issued conflicting decisions.

In the 28 years since *Buckley v. Valeo* struck down limits on candidates' campaign spending in congressional elections, the nation has witnessed the effects of a system in which campaign contributions are limited while overall

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[5] For example, respondent Homans submitted no expert witness affidavits seeking to dispute the City's five expert witness reports. While respondent Rue did present conflicting expert reports in support of his motion for summary judgment, all such conflicts should have been resolved in favor of the City in determining whether summary judgment was appropriate.

campaign spending remains unlimited. It has created relentless pressure on officeholders to become full-time fundraisers, interfering with their ability to carry out the duties for which they were elected.[6] It has fueled the dominance of special interests in generating the sums candidates need to compete in the campaign funding arms race, fostering public cynicism about government and the value of the vote.[7] It has diminished robust public debate of the issues as incumbents build ever-larger war chests that deter competitors and leave many elections effectively uncontested.[8]

Although this Court in recent years has addressed the constitutionality of limits on campaign contributions and independent expenditures in a variety of contexts, the Court has not reviewed the constitutionality of limits on candidates' campaign expenditures in light of this nation's experience with unlimited spending since *Buckley*. *Cf. Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 443 n.8 (2001) (noting that, while the FEC had not asked the Court in that case to revisit *Buckley*'s general approach to expenditure limits, "some have argued that such limits could be justified in

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[6] *See* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281 (1994), and discussion at Point I.B.2 of this Petition, *infra*.

[7] *See* Homans App. 229-230 (because of pressure to raise funds, elected officials must develop "a second set of constituents. You may call them the cash constituents." On many less-publicized issues that come before Congress, "the only people paying attention are the cash constituents. . . . The more it costs [to win election], the more any legislator has to think about – very deep[ly] about . . . – how they're going to vote."). *See also* discussion at Point I.B.1 of this Petition, *infra*.

[8] *See* discussion at n.17 of this Petition, *infra*.

light of post-*Buckley* developments in campaign finance") (citations omitted). These cases squarely present the question of whether states and municipalities, in the face of new factual developments and legal interests not addressed in *Buckley*, may demonstrate the necessity of reasonable campaign spending limits to protect the integrity of their elections and their governments.

Courts of Appeals are in conflict on the important question presented here. The Tenth Circuit's ruling striking down the City of Albuquerque's expenditure limits views *Buckley* as forever foreclosing the constitutionality of such limits, improperly treating First Amendment strict scrutiny as an automatic death knell for expenditure limits. In sharp contrast to the Tenth Circuit's ruling, the Second Circuit recently held that the constitutionality of campaign spending limits enacted by Vermont is not foreclosed by *Buckley*:

> [T]he *Buckley* Court did not conclude that the Constitution would always prohibit expenditure limits, regardless of the reasons asserted and the record supporting the limitations. It simply held that based on the record before it, "[n]o governmental interest that has been suggested is sufficient to justify" the federal expenditure limits.

Landell, at *12 (quoting *Buckley*, 424 U.S. at 55).[9]

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[9] The Sixth Circuit, like the Tenth, has held that *Buckley* precludes the constitutionality of campaign expenditure limits as a matter of law. *Kruse v. City of Cincinnati*, 142 F.3d 907, 918-919 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998). A concurring opinion in that case, however, would have held that campaign expenditure limits may survive exacting scrutiny based on facts and legal interests not addressed in *Buckley*. *Kruse*, 142 F.3d at 920 ("The Supreme Court's decision in *Buckley* . . . is not a broad pronouncement declaring all campaign expenditure limits unconstitutional") (Cohn, D.J., concurring).

As a result of the Second Circuit's ruling, states and municipalities within the Second Circuit may enact mandatory limits on campaign expenditures if they can demonstrate that the limits are narrowly tailored, in light of post-*Buckley* factual developments, to further the compelling governmental interests in (1) deterring the reality and appearance of corruption and (2) preserving the time of officeholders and candidates from the burdens and distractions of endless fundraising. *Landell* at *26. However, because the Tenth Circuit majority below characterized these same legal interests as "constitutionally incapable of justifying spending restrictions as a matter of law[,]" App. 28, states and localities within the Tenth Circuit are permanently barred from employing even the most carefully tailored limit.

Because different Courts of Appeals have reached conflicting conclusions on this question, and because the question is of immense national importance, this Court should grant the petition for certiorari.

I. THE RULING BELOW CONFLICTS WITH *BUCKLEY V. VALEO* AND WITH THE SECOND CIRCUIT'S RECENT RULING ON VERMONT'S CAMPAIGN SPENDING LIMITS.

A. *BUCKLEY* DOES NOT FORECLOSE THE CONSTITUTIONALITY OF SPENDING LIMITS.

The Tenth Circuit majority, in striking down the campaign expenditure limits enacted by petitioner City of Albuquerque, erroneously concluded that *Buckley* forecloses "as a matter of law" the possibility that expenditure limits may be upheld consistent with the First Amendment. App. 28. The Tenth Circuit's ruling misapprehends

Buckley and conflicts with the Second Circuit's ruling in *Landell*. As the Second Circuit held:

> [T]he Supreme Court, in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), did not rule campaign expenditure limits to be *per se* unconstitutional, but left the door ajar for narrowly tailored spending limits that secure clearly identified and appropriately documented compelling governmental interests.

Landell at *2.

In contrast to the ruling below, the Second Circuit found that, on a factual record distinct from that presented in *Buckley,* two compelling interests supported Vermont's expenditure limits: "preventing the reality and appearance of corruption and protecting the time of candidates and elected officials." *Landell* at *26. The Second Circuit specifically noted the Tenth Circuit's conclusion, and an earlier ruling by a divided panel of the Sixth Circuit, that *Buckley* "categorically prohibits expenditure limitations," but stated "[w]e disagree." *Landell* at *11 (citing *Homans v. City of Albuquerque*, 366 F.3d at 914-921; *Kruse*, 142 F.3d at 918-919).[10] The conflict between

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[10] After concluding that Vermont's mandatory campaign spending limits are supported by sufficiently compelling governmental interests, the *Landell* Court remanded the case to the district court for further factual findings on whether Vermont's spending limits are sufficiently narrowly tailored – in the Court's words, whether they constitute "the least restrictive alternative" for achieving the state's interests. *Landell* at *2. The Tenth Circuit majority, in contrast, held that the City could not demonstrate the narrow tailoring of its limits as a matter of law, App. at 28, affirming a grant of summary judgment to petitioner *Rue* and pretermitting any factual investigation of the narrow tailoring of the city council spending limit at trial. The Tenth Circuit also never addressed the factual question of whether the specific mayoral spending limit at issue in *Homans* was sufficiently tailored so as to permit

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courts of different circuits on this critically important question of constitutional law warrants review by this Court.

An examination of *Buckley* confirms the correctness of the Second Circuit's analysis and the error of the Tenth Circuit's contrary holding. In *Buckley*, this Court addressed the constitutionality of 1974 amendments to the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431 *et seq.* Among other provisions, FECA placed limits on the amounts that donors could contribute to candidates and on the amount that candidates could spend on their campaigns. The *Buckley* Court acknowledged that government has a compelling interest in deterring corruption and the appearance of corruption of elected officials, 424 U.S. at 23-29, and on that basis upheld FECA's limits on the amount that donors could contribute to candidates. *Id.* The Court nevertheless struck down the limits on candidates' campaign spending, concluding, on the record before it, that FECA's contribution limits alone would be sufficient to deter corruption and its appearance. 424 U.S. at 55-56.

The proposition that spending caps were a necessary concomitant to contribution limits was rejected in *Buckley* only as a matter of fact, not of law. In rejecting the argument that spending limits were necessary to reduce the incentive to circumvent direct contribution limits, this Court found: "There is no indication [in the record] that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussion of such violations will be insufficient to police the contribution provisions." 424 U.S. at 56. Because *Buckley*'s analysis was

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effective campaigns and communication with the electorate, nor did the *Homans* district court make specific findings on that issue.

factually dependent, it left the door open for a determination that expenditure limits might be justified upon a factual record different from that presented in *Buckley*.

Buckley also rejected, as legally insufficient, two other specific interests advanced by the government as justifying FECA's expenditure limits: (1) equalizing the financial resources of candidates; and (2) restraining the cost of election campaigns for its own sake. *See Buckley*, 424 U.S. at 56-57. While rejecting these specifically identified interests, the Court did not hold that consideration of new and different governmental interests was foreclosed for all time. Rather, the Court stated: "No governmental interest *that has been suggested* is sufficient to justify [FECA's spending limits]." 424 U.S. at 55 (emphasis added).

Thus, despite its application of exacting scrutiny to FECA's expenditure limits, *Buckley* did not close the door to consideration of new facts and legal interests that could justify limits on campaign spending. *Landell* *12 ("after *Buckley*, there remains the possibility that a legislature could identify a sufficiently strong interest, and develop a supporting record, such that some expenditure limits could survive constitutional review.")

The Tenth Circuit's contrary view that *Buckley* forever precludes the constitutionality of any campaign expenditure limit is at odds with this Court's teachings about the nature of judicial review. As this Court observed in *McConnell v. Federal Election Comm'n*, 540 U.S. 93, ___, 124 S.Ct. 619, 688 (2003):

> We have long "rigidly adhered" to the tenet "'never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,'" *United States v. Raines*, 362 U.S. 17, 21 (1960) (citation omitted), for "[t]he nature of judicial review constrains us

> to consider the case that is actually before us." (*quoting James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 547 (1991) (Blackmun, J. dissenting)).

Both in the First Amendment context and in constitutional review generally, strict scrutiny is still *scrutiny*, not "a straightjacket that disables Government from responding to serious problems." *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996) (discussing requirement of close judicial scrutiny in First Amendment challenge to regulations governing cable television programming). As the Court has cautioned: "[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment)). *See also Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (applying strict scrutiny to statute restricting independent expenditures by corporations in political campaigns, but upholding restriction); *Burson v. Freeman*, 504 U.S. 191, 198-211 (1992) (plurality opinion) (applying strict scrutiny to ban on electioneering activity near polling places, but upholding ban).

Thus, as the Second Circuit correctly recognized, *Buckley*'s requirement of strict scrutiny should be only the beginning, not the end, of the inquiry for courts assessing the constitutionality of expenditure limits. *Landell* at *15 ("we disagree [with plaintiffs' argument] that the high level of protection accorded political speech or the money enabling it dictates that the provision must automatically be struck down"). The Tenth Circuit's contrary holding misapprehends *Buckley* and "disables [the City of Albuquerque] from responding to serious problems." *Denver Area Educ. Telecommunications Consortium*, 518 U.S. at 741.

B. THE GOVERNMENTAL INTERESTS SUPPORTING ALBUQUERQUE'S LIMITS ARE SUFFICIENTLY COMPELLING TO SATISFY EXACTING SCRUTINY UNDER *BUCKLEY*.

1. The Tenth Circuit Erred in Rejecting the City's Compelling Interest In Deterring the Reality and Appearance of Corruption.

Buckley and subsequent decisions of this Court recognize the strong governmental interest in avoiding not only actual *quid pro quo* corruption of elected officials, but also the appearance of corruption and undue influence. *Buckley*, 424 U.S. at 26-27; *McConnell,* 124 S.Ct. at 660-666. The *Buckley* Court, however, predicted that contribution limits alone would be sufficient to deter the appearance and reality of corruption, even if spending remained unlimited. 424 U.S. at 55-56. *Buckley*'s judgment was necessarily a predictive one, because neither campaign contributions *nor* spending were subject to meaningful limitations prior to enactment of the FECA provisions reviewed in *Buckley*.

The record here demonstrates that, in the 28 years since *Buckley*, the Court's prediction about contribution limits has been proven wrong. App. 51. The federal experience with unlimited campaign spending has resulted in an "arms race" mentality in which each candidate feels compelled to raise the maximum amount possible to forestall the possibility of being outspent. Homans App. 206, 214 (Testimony of Larry Makinson).[11] Candidates' unlimited need for funds makes them particularly dependent on

[11] Larry Makinson is Senior Researcher at the Center for Responsive Politics in Washington, D.C., and one of the nation's foremost experts on campaign finance.

special interests that can generate large aggregate contributions. The absence of spending limits has therefore fostered the growth of practices such as "bundling" which effectively circumvent contribution limits. *Id.* at 216-222.

For example, a particular corporation can encourage its officers and employees to send their donations to a candidate during a certain time period, or a company or industry group can sponsor an event where donors with the same interests can make individual contributions at the same time. Donors may even be instructed to place tracking numbers on their checks to assure proper "credit" for the coordinator of the donations. Homans App. 219; *see also* Nancy Watzman & Micah L. Sifry, *O Pioneers!*, Harper's Magazine, September 2003, at 55 (quoting memorandum by Edison Electric Institute chief Tom Kuhn urging use of tracking code on individual checks "to insure that our industry is credited"). Moreover, even without formal coordination, well-heeled interests, such as industry groups with a stake in particular legislative battles, can generate multiple contributions that are collectively quite large, and candidates are aware of the sources of the largesse.[12] Thus, limits on the contributions that may be made by a particular individual or corporation do not address the concentrated financial power that well-funded interests

[12] For example, in the 2000 presidential election, MBNA America, the nation's largest credit card company, bundled over $240,000 in donations to a presidential campaign through donations by MBNA employees and officers and their families, even though individual contributions were limited to $1,000. Homans App. 218-219, 600-607. MBNA had a critical legislative goal: pushing through a bankruptcy bill that would make it more difficult for debtors to declare bankruptcy. Homans App. 220.

can exert when candidates face an unlimited need for funds.

The Tenth Circuit majority did not discuss the evidence that has undermined *Buckley*'s predictive judgment during the last 28 years. Instead, it simply reiterated that, based on *Buckley,* "campaign spending restrictions are not narrowly tailored to further the governmental interest in reducing corruption" (App. 34) and that "'campaign spending limitations cannot be justified by the anti-corruption rationale.'" *Id.* (quoting *Kruse*, 142 F.3d at 915).

As explained above, the proposition that spending caps were a necessary concomitant to contribution limits was rejected in *Buckley* only as a matter of fact, not of law. Accordingly, the City's evidence demonstrating that *Buckley*'s predictive judgment was wrong cannot be addressed merely by reiterating *Buckley*'s prediction, on the record then before the Court, that contribution limits alone would be adequate to deter corruption. As this Court only recently noted, courts cannot adequately assess the constitutionality of campaign finance regulations while turning a blind eye to developments in campaign financing since *Buckley*. *See McConnell,* 124 S.Ct. at 689 (holding that *Buckley*'s "express advocacy" test had not "aided the legislative effort to combat real or apparent corruption," and that Congress was entitled to respond to post-*Buckley* developments). The Tenth Circuit therefore should have addressed the *reality* of how limited contributions and unlimited spending have operated in practice over the past 28 years.

In sharp contrast to the Tenth Circuit, the Second Circuit has rejected a "static" view of *Buckley, Landell* at *14, and in doing so has held that a legislature is entitled

to take account of post-*Buckley* developments in determining whether spending limits are necessary to deter corruption and its appearance. *Id.* at *20-21 & n.13. Vermont elections, like those at the federal level, have been conducted with limits on contributions but no limits on spending in the years following *Buckley.* The Second Circuit's decision recognized that, "[e]ven with contribution limits, the arms race mentality has made candidates beholden to financial constituencies that contribute to them, and candidates must give them special attention *because* the contributors will pay for their campaigns." *Landell* at *21 (emphasis original); *see also id.* (noting that " 'bundling' smaller contributions from a particular company or industry" is one practice through which concentrated financial interests leverage their influence with elected officials despite contribution limits). The *Landell* Court further explained,

> [B]ecause of the limited number of campaign contributors and the constant concern of being outspent, candidates and elected officials are significantly influenced in deciding positions on issues by a belief that they are unable to oppose too many special interests, no matter how unpopular, because they will be cut off from funds.

Id. at *20.

The Second Circuit thus concluded, in direct conflict with the Tenth Circuit majority, that spending limits may be sustained based on the governmental interest in "preventing the reality and appearance of corruption," together with the interest in candidate time-protection (discussed *infra* at Point I.B.2). *Landell* at *26.[13] Because the City of

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[13] In the case at bar, Judge Lucero's opinion, unlike that of the majority, recognized that *Buckley* does not preclude reliance on the anti-corruption interest as a basis for expenditure limits. App. 14. He held,

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Albuquerque's interest in safeguarding its political process is no less compelling than Vermont's, this Court should grant the petition to address this critical issue.

2. The Tenth Circuit Erred in Rejecting the City's Compelling Interest in Preserving the Time of Officeholders and Candidates.

As the Second Circuit recently noted in *Landell*, *Buckley* did not foreclose consideration of the compelling governmental interest in preserving the time of officeholders and candidates from the demands of fundraising, so as better to perform their duties as representatives, as a basis for spending limits. *Landell* at *22-24. The concurring opinion in *Kruse* is in accord. 142 F.3d at 920 (Cohn, D.J., concurring) ("It may be possible to develop a factual record to establish that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties, or the interest in preserving faith in our democracy, is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest."). *Cf. Nixon v. Shrink Missouri Gov't PAC* ("*Shrink*"), 528 U.S. 377, 409 (2000) (Kennedy, J., dissenting) ("For now, however, I would leave open the possibility that Congress, or a state legislature, might devise a

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however, that the City's evidence was insufficient to justify spending limits, concluding that the record in Albuquerque contained less evidence of actual corruption than the record in *Buckley*. App. 20-21. This analysis is mistaken. *Buckley* rejected spending limits as an anti-corruption measure *not* because evidence of corruption was insufficient, but instead because the *Buckley* Court believed that contribution limits alone (without spending limits) would provide an adequate means of deterring corruption – a predictive judgment proven wrong by the City's evidence.

system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising").

The record here demonstrates that, when campaign spending is unlimited, fundraising becomes a full-time job for candidates and officeholders fearful of being outmatched by an opponent's spending. Jim Baca, then the Mayor of Albuquerque, attested: "As a result of this new money chase in this year's mayoral election in Albuquerque, I am now forced to spend three hours every day making fundraising phone calls. I have never before had to do this in my political career. . . . When I call people who are doing business with the city, I often am concerned about the possibility of their misperception that they are being shaken down." Homans App. 512. A former city councilor who had no trouble raising the necessary funds from small donors under spending limits described how her tactics changed when running for state senate, with no spending limit: "I spent a lot more time fundraising. . . . I went to coffee with the trial lawyers or with the big contributors, rather than just trying to solicit small contributions from a broad spectrum of people." Rue App. 708.[14]

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[14] Unlimited spending in federal elections means "[y]ou're constantly drawn by the siren song of trying to raise money for your race. . . . A very real distraction from the real business of legislating." Homans App. 474 (interview with former Rep. Leslie Byrne (D-Virginia)). *See also id.* 478-479 ("The system is horrendous at the present time because the candidates have to spend so much of their time raising the money in order to remain in the House and the Senate. . . . You'd like to be spending your time on legislation – on the floor of the Senate, in committees, with staff, deciding what other projects you want to be involved in. But the end-all and be-all is to have sufficient money to run your campaign.") (interview with former Sen.

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Survey research shows that Albuquerque citizens are concerned about this very issue. Seventy-eight percent of voters said that, if Albuquerque's spending limits were removed, it was likely that "elected officials will have to spend more time raising campaign money and less time on their official duties." Homans App. 353.

The Tenth Circuit majority reasoned that states have no legitimate interest in preventing the monopolization of candidates' time by fundraising because such monopolization is a "mere consequence" of the growth in the cost of campaigns, App. 35, and *Buckley* held that the "mere growth" in the cost of campaigns, by itself, was an insufficient basis for spending limits. *Id.* This reasoning is flawed. It is akin to saying that because government may not employ racial classifications for their own sake, government also may not take race into account in order to achieve the compelling interest in diversity in education – after all, a lack of diversity would be a "mere consequence" of refusing to take race into account. *But see Grutter v. Bollinger*, 539 U.S. 306 (2003) (although racial classifications are subject to strict scrutiny, fostering diversity is a sufficiently compelling governmental interest to justify properly tailored admissions plan that takes into account race and ethnicity).

Clearly, the rejection of one interest as a basis for governmental action does not imply rejection of all other

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Howard Metzenbaum (D-Ohio)); *id.* at 474 ("With the increasing cost of campaigns, a member spends far more time and effort and thought to raising money. And usually the effort is directed not so much at the individuals in his congressional district, but at the PACs, the special interests. . . .") (interview with former Rep. Guy Vander Jagt (R-Michigan)).

interests that may support the same action. Thus, the fact that *Buckley* found the mere desire to restrain campaign costs – without more – to be an inadequate basis for spending limits does not mean that *Buckley,* without addressing the issue, also permanently foreclosed any recognition of the compelling state interest in preserving the time of elected officials to govern.[15]

As the Second Circuit has recognized, the interest in preserving the time of elected officials and candidates clearly is distinct from an interest in holding down campaign spending merely because it is deemed wasteful or excessive. *Landell* at *23. The former is based not on an arbitrary view of how much spending is "too much," but instead on the critical goal of assuring that officeholders can carry out the duties for which they are elected – a condition necessary to the proper functioning of government. "Legislators and aspirants for legislative office who devote themselves to raising money round-the-clock are

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[15] Judge Lucero's opinion recognized that preserving the time of officeholders from the burdens of fundraising may be a compelling governmental interest supporting spending limits. App. 22. Judge Lucero's opinion, however, imposed an impossible evidentiary burden on the City to invoke that interest. Judge Lucero found insufficient evidence that Albuquerque candidates spent more time on fundraising in the absence of limits than was true when limits were in place. App. 23. Not only did his analysis improperly resolve factual conflicts in the *Rue* record against the City, *id.*, but it ignored the fact that Albuquerque had yet to experience a full election cycle without spending limits when the cases were litigated, and thus was only beginning to see the impact of unlimited spending on candidates' time. Albuquerque was entitled to rely on the extensive federal experience with unlimited campaign spending to support the need for regulation. *See Shrink,* 528 U.S. at 393 n.6 (states entitled to rely on experience of other jurisdictions in determining need for reforms); *cf. Colorado Republican Federal Campaign Comm.,* 533 U.S. at 457 (noting difficulty of proving harms that would exist in absence of long-enforced statute).

not in essence representatives." Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising*, 94 Colum. L. Rev. at 1283. *See also* Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?*, 85 Minn. L. Rev. 1729, 1769-1770 (2001).[16]

The Tenth Circuit majority also suggested that the City's concerns about excessive time spent on fundraising are not important because officeholders "are not required to run for reelection if they feel it interferes with their ability to represent their constituents." App. 37 n.3. By this logic, Albuquerque must resign itself to a government composed solely of officeholders who do not mind if their time is devoted nonstop to courting donors rather than to governing – precisely the scenario the citizens of Albuquerque, for good reason, wish to avoid.

Indeed, the Tenth Circuit's reasoning, if accepted, would do away with all restrictions on campaign financing. For example, officeholders who do not wish to feel beholden to $100,000 donors are not required to run for reelection; accordingly, under the Tenth Circuit's analysis, there would be no compelling interest in limiting the size of individual contributions to candidates. In an ideal world, all candidates for office might voluntarily refrain from actions contrary to the public interest, but that

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[16] The Tenth Circuit majority cites a passage from one of the briefs filed in *Buckley* as evidence that *Buckley* must have addressed and rejected the officeholder time-protection rationale as a compelling governmental interest. App. 36. The scope of a Supreme Court opinion, however, must be determined by the text of the opinion, not by parsing isolated sentences from a party's brief. This Court's careful description in *Buckley* of the governmental interests proffered in support of spending limits, 424 U.S. at 55-57, makes no mention of the time-preservation interest and the opinion cannot fairly be read to have ruled upon it. *See Landell* at *23.

should not disable government from taking more concrete action to avoid such harms. As James Madison observed in Federalist No. 51, "What is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary." Alexander Hamilton, James Madison, & John Jay, *The Federalist Papers* 319 (Clinton Rossiter, ed., Signet Classics 2003) (1788).[17]

II. THE QUESTION OF WHETHER STATE AND LOCAL GOVERNMENTS MAY ENACT PROPERLY TAILORED LIMITS ON CAMPAIGN SPENDING IS OF EXCEPTIONAL NATIONAL IMPORTANCE.

In recent years, state and local governments in three Circuits have determined that unlimited campaign expenditures by candidates have harmed critical governmental

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[17] In addition to deterring corruption and preserving the time of officeholders and candidates, Albuquerque's spending limits serve other compelling governmental interests. Electoral competition is the indispensable condition for holding elected officials accountable to the voters, because without competition the voters have no choice. Homans App. 322-323, 493. High-spending campaigns that deter challengers from entering a race effectively censor political speech and defeat accountability by eliminating the conditions for a meaningful debate of the issues. *Id.*; *see also* Homans App. 226-228 (documenting lack of competition in congressional elections conducted without spending limits); Richard Briffault, *The Beginning of the End of the Buckley Era?*, 85 Minn. L. Rev. at 1766 ("The burdens of fundraising may not just limit challenger finances, but may also discourage many potential challengers from entering the race altogether.")

Although *Buckley* held that spending limits could not be justified by an interest in "equaliz[ing] the relative ability of individuals and groups to influence the outcome of elections" 424 U.S. at 48, the *Buckley* Court did not confront a record showing that the First Amendment goal of robust public debate and accountability of elected officials has been undermined by the effects of unlimited spending on electoral competition.

interests in a manner not foreseen by the *Buckley* Court, and have sought to enforce mandatory limits on campaign expenditures as a means of redressing these harms. In addition to Albuquerque and Vermont, the Supreme Court of Ohio sought to protect its judicial elections from the corrosive effects of unlimited fundraising by amending its judicial code of ethics to set campaign expenditure limits for Ohio's judicial elections in 1995,[18] and the City of Cincinnati enacted spending limits for candidates seeking municipal office that same year.[19] The United States Congress also has demonstrated interest in employing campaign spending limits for federal elections.[20]

The view that *Buckley* automatically invalidates spending limits endangers the ability of Congress, states and municipalities to respond to serious threats to their democratic processes.

> Many years ago we observed that "[t]o say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection."

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[18] *See Suster v. Marshall,* 149 F.3d 523 (6th Cir. 1998) (affirming grant of preliminary injunction against spending limit), *cert. denied,* 525 U.S. 1114 (1999).

[19] Cincinnati Ordinance 240-1995 (struck down in *Kruse v. City of Cincinnati*).

[20] Members of Congress have introduced campaign spending limit bills at least fifteen times since this Court's ruling in *Buckley.* S. 1684 and S. 1185 (98th Congress); S. 59 (99th Congress); H.R. 2473 (100th Congress); H.R. 1456 (101st Congress); H.R. 3571 and H.Res. 168 (103rd Congress); H.R. 3651 and H.R. 3658 (104th Congress); S. 1057, H.R. 77, H.R. 243, H.R. 1366, H.R. 3851 (105th Congress); S. 1502 (106th Congress).

McConnell, 124 S.Ct. at 706 (*quoting Burroughs v. United States,* 290 U.S. 534, 545 (1934)). That observation aptly summarizes the importance of revisiting the constitutionality of campaign spending limits in light of the lessons learned from the nation's experience with unlimited spending since 1976.

While the Court has had numerous opportunities in recent years to review limits on contributions in light of the nation's post-*Buckley* experience,[21] the Court has not reviewed a statute limiting candidates' campaign expenditures in the 28 years since *Buckley.* Nevertheless, members of this Court have suggested, in other cases, that the Court may need to undertake such a review, further underscoring the importance of the issue.[22]

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[21] *See, e.g., McConnell,* 124 S.Ct. at 654-684 (addressing regulation of soft-money contributions to political parties); *Shrink,* 528 U.S. 377 (addressing limits on contributions to candidates).

[22] *See Shrink,* 528 U.S. at 405 (concurring opinion of Breyer, J., joined by Ginsburg, J.) (calling for approach that balances competing constitutional interests and stating "it might prove possible to reinterpret aspects of *Buckley* in light of the post-*Buckley* experience stressed by Justice Kennedy . . . making less absolute the contribution/expenditure line, particularly in respect to independently wealthy candidates, whose expenditures might be considered contributions to their own campaigns"); *id.* at 409 (Kennedy, J., dissenting) (noting difficulty of constitutional issues surrounding campaign regulation but stating, "For now, however, I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising"); *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n,* 518 U.S. 604, 649-650 (1996) (Stevens, J., joined by Ginsburg, J., dissenting) ("It is quite wrong to assume that the net effect of limits on contributions and expenditures – which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fund-raising, and to diminish the importance of

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Finally, extensive and thoughtful academic commentary on *Buckley* has illustrated the serious costs to democratic values of unlimited campaign spending, and has urged re-examination of the constitutionality of campaign spending limits.[23]

Petitioners believe that nothing in *Buckley* forecloses examination of new facts and legal interests supporting the City of Albuquerque's spending limits. If, however, the Tenth Circuit correctly concluded that *Buckley* must be overruled in order to permit such examination, petitioners submit that the post-*Buckley* developments canvassed in this record merit this Court's reconsideration of *Buckley*. As this Court has noted:

> In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty.

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repetitive 30-second commercials – will be adverse to the interest in informed debate protected by the First Amendment.").

[23] *See, e.g.*, Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?*, 85 Minn. L. Rev. at 1769-1770; Mark Alexander, *Campaign Finance Reform: Central Meaning And A New Approach*, 60 Wash. & Lee L. Rev. 767, 827-834 (2003); Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising*, 94 Colum. L. Rev. at 1288-1289; Burt Neuborne, *Buckley's Analytical Flaws*, 6 J.L. & Pol'y 111, 111-117 (1997); Peter M. Shane, *Commentary, Back To The Future Of The American State: Overruling Buckley v. Valeo And Other Madisonian Steps*, 57 U. Pitt. L. Rev. 443, 446-447 (1996); Owen M. Fiss, *Free Speech and Social Structure*, 71 Iowa L. Rev. 1405, 1406-1408, 1415 (1986).

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 864 (1992).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CITY OF ALBUQUERQUE

BRENDA WRIGHT
Counsel of Record
LISA J. DANETZ
JOHN C. BONIFAZ
NATIONAL VOTING RIGHTS INSTITUTE
27 School Street, Suite 500
Boston, MA 02108
(617) 624-3900

ROBERT M. WHITE
City Attorney
RANDY M. AUTIO
Deputy City Attorney
P.O. Box 2248
Albuquerque, NM 87103
(505) 768-4500

Attorneys for Petitioners

366 F.3d 900

United States Court of Appeals,
Tenth Circuit.

Rick HOMANS, Plaintiff-Appellee,
v.
The CITY OF ALBUQUERQUE, a municipal corporation; Francie D. Cordova, in her capacity as Clerk of the City of Albuquerque, Defendants-Appellants.
Sander Rue, Plaintiff-Appellee,
v.
The City of Albuquerque, a municipal corporation; Francie D. Cordova, in her capacity as Clerk of the City of Albuquerque; the City of Albuquerque Board of Ethics and Campaign Practices, a board of the City of Albuquerque, Defendants-Appellants.

Nos. 02-2244, 02-2316.

April 27, 2004.

Brenda Wright (Lisa J. Danetz, National Voting Rights Institute, Boston, MA; Robert M. White, City Attorney, and Randy M. Autio, Deputy City Attorney, Albuquerque, NM, with her on the briefs), National Voting Rights Institute, Boston, MA, for Defendants-Appellants in 02-2244.

Thomas C. Bird (Richard L. Alvidrez with him on the brief), Keleher & McLeod, P.A., Albuquerque, NM, for Plaintiff-Appellee in 02-2244.

Lisa J. Danetz (Brenda Wright, National Voting Rights Institute, Boston, MA; Robert M. White, City Attorney, and Randy M. Autio, Deputy City Attorney, with her on the briefs), National Voting Rights Institute, Boston, MA, for Defendants-Appellants in 02-2316.

James Bopp, Jr., (Henry M. Bohnhoff, Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, NM; and Paul M. Kienzle, III, Scott & Kienzel, PA, Albuquerque, NM with him on the brief), Bopp, Coleson & Bostrom, Terre Haute, IN, for Plaintiff-Appellee in 02-2316.

Before LUCERO, O'BRIEN, and TYMKOVICH, Circuit Judges.

LUCERO, Circuit Judge.

In response to the increasingly apparent need to reform the ways in which political campaigns are financed, the city of Albuquerque implemented a campaign-finance reform system in 1974. It adopted limits on campaign expenditures and contributions in municipal elections. In 2001, mayoral candidate Rick Homans brought a challenge under the First and Fourteenth Amendments[1] to the mayoral-candidate expenditure restriction; ruling in favor of Homans, the district court permanently enjoined enforcement of this limit. City-council candidate Sander Rue brought a similar suit challenging the expenditure limit for city-council candidates and obtained a favorable summary judgment as well. Both cases are before us on review, and because they present similar issues, we consolidate them for review. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm. The following expresses the opinion of the court as to parts I, II, and III. As to part IV, it concurs in part with the opinion of Judge Tymkovich,

[1] Protections afforded under the First Amendment have been incorporated into the Fourteenth Amendment to apply against the states. *Everson v. Bd. of Educ.*, 330 U.S. 1, 13-15, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

which constitutes the majority opinion of the court as to part IV.

I

As part of an overall restructuring of its city government in 1974, Albuquerque amended its city charter and implemented an election code imposing disclosure requirements and limiting expenditures and contributions for municipal elections. More than ninety percent of voters approved these reform measures. As it reads today, the election code provides:

> No candidate shall allow or accept contributions or make expenditures in excess of the following for any election:
>
> 1. To a candidate for the office of Councillor, contributions or expenditures equal to twice the amount of the annual salary paid by the City of Albuquerque to Councillors as of the date of filing of the Declaration of Candidacy.
>
> 2. To a candidate for the office of Mayor, contributions or expenditures equal to twice the amount of the annual salary paid by the City of Albuquerque to the Mayor as of the date of filing of the Declaration of Candidacy.

Albuquerque City Charter, art. XIII, sec. 4(d).[2] Candidate-expenditure restrictions were in effect for each mayoral

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[2] Albuquerque's city charter also caps individual contributions at five percent of the annual salary of the office. *Id.* at sec. 4(e). The propriety of the contribution limits, which theoretically would appear to allow twenty individual contributors to fund one hundred percent of a campaign at the full expenditure limitation level, is not before us.

and city-council election from 1974 to 1995. Limits on the 1997 election were temporarily enjoined pursuant to a court order; however, parties to that litigation stipulated dismissal of the lawsuit, and the spending limits were restored for the 1999 election. For the 2001 elections, the mayoral-campaign expenditure limit was $174,720; city-council candidates were limited to spending a maximum of $17,056. Violation of these limits carries a fine of up to $500 per violation, removal from office, and/or public reprimand.

After filing suit in federal district court on August 10, 2001, plaintiff Rick Homans filed a motion for a preliminary injunction, which was denied on September 1, 2001. *Homans v. City of Albuquerque,* 160 F.Supp.2d 1266 (D.N.M.2001) ("*Homans I*"). He then filed an interlocutory appeal on September 4, 2001, seeking an emergency injunction pending appeal. Two days later, a two-member motions panel of this court granted the request and enjoined enforcement of the expenditure limit pending review of the merits. *Homans v. City of Albuquerque,* 264 F.3d 1240, 1245 (10th Cir.2001) (per curiam) ("*Homans II*"). In doing so, the motions panel held that Homans established a likelihood of success on the merits regarding his claim that the expenditure limit violated the First and Fourteenth Amendments under *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam). *Homans II,* 264 F.3d at 1243-44.

On February 13, 2002, the parties filed a joint motion for stipulated admission of evidence and expedited determination on the merits in district court. The district court entered a declaratory judgment in favor of Homans and permanently enjoined enforcement of the provision in August 2002. *Homans v. City of Albuquerque,* 217 F.Supp.2d 1197

(D.N.M.2002) ("*Homans III*"). While the court stated its own view that the expenditure limitations restriction survives exacting scrutiny under *Buckley,* it found the contrary conclusion mandated by the motions-panel's ruling in *Homans II. Homans III,* 217 F.Supp.2d at 1206. Albuquerque appeals.

Plaintiff Sander Rue was a duly qualified candidate for District Five City Councillor who also ran in the October 2001 election. In his suit filed in federal district court in September, 2001, he claimed that the city-council campaign-expenditure limitation violates *Buckley.* The district court granted summary judgment in favor of Rue and permanently enjoined enforcement of the city-council restriction on October 11, 2002, relying on the motions-panel's ruling in *Homans II* and the district court's decision in *Homans III. Rue v. City of Albuquerque,* Civ. No. 01-1036 JP/LFG (D.N.M. Oct. 11, 2002). Albuquerque appeals.[3]

II

As to the grant of summary judgment in Rue's case, we review the district court's decision de novo, applying the same standards used by the district court and construing the facts in the light most favorable to Albuquerque. *See Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.,* 165 F.3d 1321, 1326 (10th Cir.1999).

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[3] Although the elections have passed, this does not render the cases moot because the issues raised are "capable of repetition, yet evading review." *See First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 774, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978); *Suster v. Marshall,* 149 F.3d 523, 527 (6th Cir.1998).

With regard to the final decision in *Homans III,* we ordinarily review the district court's legal conclusions de novo, *Dang v. UNUM Life Ins. Co. of Am.,* 175 F.3d 1186, 1189 (10th Cir.1999), and its factual findings for clear error. Fed.R.Civ.P. 52(a). Because this case implicates First Amendment concerns, however, we have "an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) (quotations omitted). We therefore view the evidence objectively rather than in the light most favorable to the City.

Our standard in reviewing Rue's case is thus more favorable to the City than our standard in Homans' case. For this reason, with respect to each claim, we evaluate the evidence first in the light most favorable to the City to determine whether summary judgment was proper in *Rue.* Only if this less stringent standard is satisfied will we conduct an independent and objective examination of the evidence to review whether the permanent injunction in Homans' case was proper.

III

As an initial matter, we determine whether the *Homans II* decision, in which a motions panel of this court granted an injunction pending appeal against the expenditure limit, has binding effect. *See Homans II,* 264 F.3d at 1243, 1245. Attempting to leverage this interlocutory decision to its maximum possible effect, Homans argues that the *Homans II* ruling constitutes the law of the case

and restricts us in our merits determination.[4] The district court agreed, stating that although it was inclined to conclude that the expenditure limit for mayoral campaigns survives the exacting scrutiny required under *Buckley,* it was bound by the motions-panel ruling to conclude otherwise. *Homans III,* 217 F.Supp.2d at 1206. We disagree.

In general, the law of the case doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California,* 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983). Law of the case "is solely a rule of practice and not a limit on the power of the court." *Mason v. Texaco, Inc.,* 948 F.2d 1546, 1553 (10th Cir.1991) (citing *Messinger v. Anderson,* 225 U.S. 436, 444, 32 S.Ct. 739, 56 L.Ed. 1152 (1912)). Thus, the doctrine is discretionary rather than mandatory. *Kennedy v. Lubar,* 273 F.3d 1293, 1299 (10th Cir.2001); *Stifel, Nicolaus & Co. v. Woolsey & Co.,* 81 F.3d 1540, 1544 (10th Cir.1996).

In the instant matter, the two judge panel decision of our court constituted an interlocutory ruling, and its holding was limited to the conclusion that Homans had shown a likelihood of success on the merits of his claim.[5] *Homans II,* 264 F.3d at 1243-44. Courts repeatedly have emphasized that a decision as to the likelihood of success

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[4] In similar fashion, Rue argues that the *Homans II* order binds review of the merits of the city-council limits.

[5] To the extent that any language in *Homans II* can be read as an assessment of the actual merits of Homans' claim, as opposed to his likelihood of success on the merits, such language is dicta. Dicta is not subject to the law of the case doctrine. *See In re Meridian Reserve, Inc. v. Bonnett Res. Corp.,* 87 F.3d 406, 410 (10th Cir.1996).

is tentative in nature and not binding at a subsequent trial on the merits. *Univ. of Tex. v. Camenisch,* 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981) ("[F]indings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits."); *Southco, Inc. v. Kanebridge Corp.,* 324 F.3d 190, 195 (3d Cir.2003); *A.M. Capen's Co. v. Am. Trading & Prod. Corp.,* 202 F.3d 469, 473 (1st Cir.2000). Were the opposite true, an unacceptable conflation of the merits decision and the preliminary inquiry would result. Moreover, if the district court were bound in the manner suggested, then the decision of the motions panel would also bind the appellate panel reviewing the merits. This is not the rule. When reviewing a decision by a prior motions panel, we are "uninhibited by the law of the case doctrine." *Stifel,* 81 F.3d at 1544.

Our own circuit precedent expressly rejects the proposition urged by Homans and articulates the rationale for doing so. *See id.* at 1543-44. As we have explained, "a motions panel's decision is often tentative because it is based on an abbreviated record and made without the benefit of full briefing and oral argument." *Id.* at 1544. In the instant case, the motions panel did not hear oral argument, and briefing proceeded on an expedited schedule in light of the impending election. Homans filed his motion on September 4, 2001, and the City was required to submit its response the next day; the motion was granted on the following day, September 6, 2001. In light of this truncated schedule and the "avowedly preliminary [and] tentative" nature of the emergency-injunction ruling, *Council of Alternative Political Parties v. Hooks,* 179 F.3d 64, 69 (3d Cir.1999) (quotation omitted), a motions-panel ruling does not establish the law of the case; therefore,

neither the district court nor this court is constrained in its review of the merits by the September 6 ruling.[6] Accordingly, we reject Homans' argument and hold that the district court erred in concluding that it was bound by the law of the case doctrine.

IV

We proceed to the merits of Homans' and Rue's claims. Although the two cases stand in differing procedural postures, they raise an identical substantive claim: that the campaign-expenditure limits in the Albuquerque City Charter violate the First and Fourteenth Amendments.

Every challenge to campaign-finance reform provisions must begin with an analysis of the watershed case of *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Analyzing the 1974 amendments to the Federal Election Campaign Act ("FECA"), the Supreme Court developed a jurisprudential distinction between restrictions on campaign expenditures and restrictions on campaign contributions. Although both types of restrictions limit core political speech and are therefore subject to "exacting scrutiny," *id.* at 16, 96 S.Ct. 612, the Court concluded that expenditure limits impose "significantly more severe restrictions on protected freedoms" than limits on contributions. *Id.* at 22, 96 S.Ct. 612. As the Court explained, a "restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of

[6] From this it follows that neither the district court considering Rue's claim nor this court in reviewing that decision is constrained by the *Homans II* ruling.

expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19, 22, 96 S.Ct. 612. For this reason, expenditure limits raise graver constitutional concerns and are invalidated more frequently. *Id.* at 55-56, 59, 96 S.Ct. 612 (upholding contribution limits but invalidating expenditure limits); *see also McConnell v. Fed. Election Comm'n,* 540 U.S. ___, 24, 124 S.Ct. 619, 655, 157 L.Ed.2d 491, (2003) ("In *Buckley* and subsequent cases, we have subjected restrictions on campaign expenditures to closer scrutiny than limits on campaign contributions."); *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.,* 533 U.S. 431, 440, 121 S.Ct. 2351, 150 L.Ed.2d 461 (2001) ("*Colorado Republican II*") ("[L]imits on political expenditures deserve closer scrutiny than restrictions on political contributions."); *Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 387-88, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) ("*Shrink Missouri*") (concluding that differing standards govern review of contribution limits and expenditure limits, and that contribution limits may be justified when they are "closely drawn" to serve a "sufficiently important interest"); *Fed. Election Comm'n v. Mass. Citizens for Life,* 479 U.S. 238, 259-60, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.").

Although a less stringent standard of review applies to limits on political contributions, we conclude that the standard for expenditure limits operates identically to strict scrutiny review. To be upheld, therefore, the campaign-expenditure restrictions must be both narrowly tailored, *Fed. Election Comm'n v. Nat'l Conserv. Political Action Comm.,* 470 U.S. 480, 496, 105 S.Ct. 1459, 84

L.Ed.2d 455 (1985) ("*NC-PAC*"), and necessary to serve a compelling state interest, *Mass. Citizens for Life,* 479 U.S. at 251-52, 107 S.Ct. 616. *See also Austin v. Mich. Chamber of Commerce,* 494 U.S. 652, 657, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990) (applying strict scrutiny to review state restrictions on corporate political expenditures); *Kruse v. City of Cincinnati,* 142 F.3d 907, 912-13 (6th Cir.1998) (holding that municipal restrictions on candidate expenditures are subject to strict-scrutiny review).

In conducting strict scrutiny review, it is essential to acknowledge that such scrutiny is not "strict in theory, but fatal in fact." *See, e.g., Grutter v. Bollinger,* 539 U.S. 306, 123 S.Ct. 2325, 2338, 156 L.Ed.2d 304 (2003). Despite this repeated admonition by the Supreme Court, appellees insist that *Buckley* imposes a per se ban on all candidate-expenditure restrictions. Given the Supreme Court's distaste for "imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems," *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC,* 518 U.S. 727, 741, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996), we are obliged to disagree.

In *Buckley,* defenders of FECA's restrictions on candidate expenditures proffered various rationales to justify the limits, 424 U.S. at 55-57, 96 S.Ct. 612;[7] nonetheless, the Court invalidated the expenditure cap, holding that "[n]o governmental interest *that has been suggested* is sufficient to justify the restriction." *Id.* at 55, 96 S.Ct. 612

[7] The three rationales proffered were as follows: (1) to deter corruption and the appearance of corruption; (2) to equalize candidates' resources; and (3) to contain the skyrocketing costs of political campaigns.

(emphasis added). The Court's chosen language leaves open the possibility that at least in some circumstances expenditure limits may withstand constitutional scrutiny. *See Kruse,* 142 F.3d at 920 (Cohn, J., concurring) (stating that "*Buckley* . . . is not a broad pronouncement declaring all campaign expenditure limits unconstitutional," and that it remains possible to develop a factual record that would sustain such restrictions). Concluding that it might be possible to devise a system of campaign-expenditure limits that would survive exacting scrutiny, we evaluate Albuquerque's attempt to do so.

A

To satisfy strict scrutiny review, Albuquerque must establish that its candidate-expenditure restrictions are necessary to further a compelling state interest. Albuquerque sets forth the following rationales to justify the limits: (1) deterrence of corruption and enhancement of public confidence in the electoral process; (2) preservation of officeholders' ability to perform their duties without devoting excessive time to fundraising; and (3) encouragement of electoral competition. We address each rationale.

1

Speaking nearly five decades ago, Justice Frankfurter made the following assessment of the corruption and public confidence issue:

> We all know . . . that one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign

> contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest.

United States v. United Auto. Workers, 352 U.S. 567, 576, 77 S.Ct. 529, 1 L.Ed.2d 563 (1957) (quotation omitted). Some time later, the Supreme Court explained:

> Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance. Democracy works only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.

Shrink Missouri, 528 U.S. at 390, 120 S.Ct. 897 (quotation omitted). Most recently, the Supreme Court reiterated the importance of preventing corruption or its appearance in the context of political contribution limits. *See McConnell,* 540 U.S. at 33, 124 S.Ct. at 660 ("Our cases have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits."). Despite this precedent, Homans argues to no avail that as a matter of law *Buckley* mandates that expenditure limits can never be justified by the anti-corruption rationale.

It is well-established that the deterrence of corruption constitutes a compelling state interest. *See Austin,* 494 U.S. at 657-60, 110 S.Ct. 1391; *NC-PAC,* 470 U.S. at 496-97, 105

S.Ct. 1459. The question remains whether Albuquerque's expenditure limits are *necessary* to serve this end. *See Burson v. Freeman,* 504 U.S. 191, 198, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992) (noting that exacting scrutiny requires that the regulation be *necessary* to serve a compelling state interest). In the particular circumstances of *Buckley,* the Court rejected the anti-corruption rationale in reviewing FECA's campaign-expenditure limits, concluding that the interest in preventing corruption was served adequately in that case by the federal contribution limits and disclosure provisions. Rejecting the corollary argument that expenditure limits were necessary to prevent circumvention of permissible campaign-finance provisions, the Court relied on the factual conclusion that "[t]here is no indication that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussions of such violations will be insufficient." 424 U.S. at 26, 55-56, 96 S.Ct. 612. Attaching significance to the fact that FECA permitted successful candidates to retain contributions in excess of expenditure limits and to use these funds for any lawful purpose, the *Buckley* Court explained: "This provision undercuts whatever marginal role the expenditure limits might otherwise play in enforcing contribution ceilings." *Id.* Contrary to appellees' contention, *Buckley* does not preclude the use of expenditure limits to further a state's anti-corruption interest in all circumstances. *Cf. Kruse,* 142 F.3d at 915 (acknowledging that *Buckley* may be interpreted to leave open the possibility that the anti-corruption rationale may, under some circumstances, justify candidate-expenditure caps).

Nor are we persuaded that subsequent case law prohibits the use of expenditure caps to deter corruption

as a matter of law. In *Kruse,* the Sixth Circuit reached the opposite conclusion and held that *NC-PAC* and *Colo. Republican Federal Campaign Comm. v. Federal Election Comm'n,* 518 U.S. 604, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996) ("*Colorado Republican I*") "make eminently clear that spending limits . . . are unconstitutional not simply because of the presence of contribution limits but because they are not narrowly tailored to serve this interest." 142 F.3d at 915. We conclude that this view reads too much into *NC-PAC* and *Colorado Republican I.*

In *NC-PAC,* the Court invalidated restrictions on political action committees' independent expenditures when the spending was not coordinated with a campaign; the court did not address the permissibility of restrictions on candidate expenditures. 470 U.S. at 496-98, 105 S.Ct. 1459. Even were *NC-PAC*'s reasoning to apply to restrictions on candidate expenditures, its holding would be limited to the facts in that case. The Court's explicit holding was that *"[o]n this record,* . . . an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more." *Id.* at 498, 105 S.Ct. 1459 (emphasis added). Similarly fact-bound is the holding in *Colorado Republican I,* in which the Supreme Court invalidates limits on spending by political parties, which are treated as "independent expenditures." 518 U.S. at 613-19, 116 S.Ct. 2309. The Court based its conclusion on the absence of coordination between the candidate and the source of the expenditure, which prevented the Court from assuming, "*absent convincing evidence to the contrary,* that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption of the electoral system." *Id.* at 617-18, 116 S.Ct. 2309 (emphasis added). Both *NC-PAC* and *Colorado*

Republican I thus explicitly leave open the possibility that in certain circumstances, a factual record may establish "convincing evidence" and thus justify the need for expenditure limits to reduce corruption or the appearance of corruption.

Unfortunately for Albuquerque, we conclude that the record in this case does not aggregate to such "convincing evidence." As a consequence, we are bound to reject the contention that the City's expenditure limits are *necessary* to deter corruption. The City submits the following as evidence to support its position: (1) evidence demonstrating the ease with which contribution limits are circumvented; (2) voter turnout statistics; (3) voter surveys; and (4) anecdotal evidence of corruption.

As to the first category of evidence, the City focuses on the use of tactics such as "bundling" at the federal level, arguing that expenditure limits are necessary to prevent circumvention of contribution limits. Assuming that such evidence could demonstrate that expenditure limits are necessary to reduce corruption,[8] we are not persuaded that

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[8] Notably, evidence of circumvention of contribution limits, *standing alone,* could not sustain the more onerous burdens imposed by expenditure limits:

> The discussion in [the earlier section of the *Buckley* Opinion] explains why the Act's expenditure limitations impose far greater restraints on the freedom of speech and association than do its contribution limitations. The markedly greater burden on basic freedoms caused by [FECA's independent expenditure provision] thus cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations.

Buckley, 424 U.S. at 44, 96 S.Ct. 612; *see also Kruse,* 142 F.3d at 915-16 (holding that *Buckley* expressly rejects the argument that spending caps are justified by the need to enforce contribution limits).

bundling practices at the federal level are comparable to those at the local level. Although the City is entitled to rely on evidence from other jurisdictions to justify campaign-finance reform measures, *Shrink Missouri,* 528 U.S. at 394 & n. 6, 120 S.Ct. 897 (citing *Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 51-52, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)), it may only do so if the evidence relied upon is "reasonably believed to be relevant to the problem that the city addresses." *Id.* The City does not proffer any argument, much less evidence, suggesting that local bundling practices are analogous to federal ones.

But the City's evidence of the need to deter corruption is not limited to documenting bundling at the federal level – the City introduces additional, independent evidence of the public appearance of corruption. Submitting statistics on Albuquerque voter turnout, the City argues that, contrary to common claims that expenditure limits suppress voter turnout, Albuquerque voters are more likely to vote when expenditure limits are imposed. Recognizing a positive relationship between voter turnout and the public perception of corruption is not unprecedented; as earlier noted, the Supreme Court has articulated, "Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Shrink Missouri,* 528 U.S. at 390, 120 S.Ct. 897.[9] To establish the relationship in the instant case, the

[9] This statement suggests that turnout rates correlate with expenditure limits because expenditure limits decrease the perception of corruption, which in turn increases turnout. Albuquerque, however, suggests another reason for the relationship between turnout rates and expenditure limits – one which does not implicate the anti-corruption rationale. It proffers the somewhat counterintuitive claim that expenditure

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City submits that in Albuquerque elections from 1974 until 2001, an average of 40.3% of registered voters participated in all city elections for which the spending limits were in place.[10] This figure is particularly impressive when compared to the 25 to 35% turnout rate for city elections nationally. This comparison figure, however, is based on the percentage of the voting-age population, not the percentage of registered voters as it was in the Albuquerque figure; indeed, a calculation of Albuquerque voter turnout as a percentage of the voting age population reveals a turnout rate of only 28.3% between 1984 and 1989. While these figures may cast doubt on the suggestion that spending limits *inhibit* turnout rates, they assuredly do not establish the affirmative of the proposition: that Albuquerque's spending limit actually *increases* turnout rates, as the City's own expert readily concedes.[11]

Telephone survey results[12] are submitted by Albuquerque in support of its argument that expenditure limits

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limits improve the public's knowledge base, which in turn increases turnout. Implicitly, then, Albuquerque suggests that expenditure limits are necessary not only to further an interest in deterring corruption, but also to further an interest in enhancing the electorate's knowledge.

[10] The data for the two elections for which spending limits were enjoined are as follows: in the 1997 election, only 33% of registered voters turned out; in the 2001 election, however, an impressive 42.4% voted.

[11] *Kruse* implicitly rejected a similar argument that turnout rates might be used to demonstrate the need to further an interest other than anti-corruption. 142 F.3d at 916. Because we are unpersuaded that turnout rates in fact correlate with expenditure limits, we have no occasion to reach this issue.

[12] Survey results are an acceptable form of evidence to demonstrate the need for campaign-finance reform measures. *Shrink Missouri,* 528

(Continued on following page)

are necessary to combat the public perception of corruption.[13] This survey evidence does suggest that Albuquerque voters have more confidence in the integrity of local elections than federal elections, which have no spending limits. On the other hand, appellees' evidence also suggests that voters generally trust local government more than state and federal government, regardless of spending limits. Albuquerque's survey results demonstrate that voters think that the removal of spending limits increases the potential for corruption. By contrast, appellees' evidence suggests that the amount of spending in an election does not affect voter cynicism when other variables are controlled.

Anecdotal evidence supports Albuquerque's contention that special interests are perceived to exercise an undue influence in elections. For example, a New Mexico State Senator described the local influence of contributions from certain industries. Specifically, she cited the influence of the alcohol industry in delaying legislation to prohibit "drive-up windows" for the purchase of alcohol, and the influence of the gambling industry in obtaining favorable revenue-sharing compacts with the state. An expert in the

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U.S. at 394, 120 S.Ct. 897; *Mont. Right to Life Ass'n v. Eddleman*, 306 F.3d 874, 882 (9th Cir.2002); *Daggett v. Comm'n on Governmental Ethics and Elections*, 205 F.3d 445, 457-58 (1st Cir.2000).

[13] The City's evidence is the result of a telephone survey conducted in August 1998 by Lake Snell Perry & Associates of 400 registered voters who reside in Albuquerque. These results have a margin of sampling error of +/-4.9%.

Appellees' argument that majoritarian views cannot dictate the bounds of First Amendment protections is misplaced. Such barometers of public sentiment are relevant in the campaign-finance context, to the extent that they show the need to remedy a public perception of corruption. *See, e.g., Shrink Missouri*, 528 U.S. at 394, 120 S.Ct. 897.

field of campaign-finance, Larry Makinson, testified to a correlation between legislative voting and campaign-contributions at the federal level,[14] citing as an example the Tauzin-Dingell bill.

While recognizing the possibility that the government may provide sufficient evidence of the need for candidate-expenditure caps to prevent corruption, we nonetheless conclude that the evidence before us, even viewed in the light most favorable to Albuquerque, is no more compelling than the evidence the Court effectively rejected in *Buckley*, 424 U.S. at 29, 96 S.Ct. 612. In *Buckley,* FECA's defenders also submitted survey evidence suggesting that the public perceived undue influence by special interests and anecdotal evidence of corruption surrounding the 1972 election; indeed, the *Buckley* evidence was of a far greater magnitude than that presented here and smelled of actual quid pro quo. *See id.* at 27 n. 28, 96 S.Ct. 612 (referencing *Buckley v. Valeo,* 519 F.2d 821, 839-40, & nn. 36-38 (D.C.Cir.1975) for evidence documenting the undue influence of the dairy industry, illegal corporate contributions, and promise of diplomatic posts in exchange for hefty campaign contributions). While undoubtedly troubling, Albuquerque's evidence does not approach the palpable sense of corruption prompting the federal amendments in 1974. Because the *Buckley* evidence was held insufficient to demonstrate that FECA's candidate-expenditure limits were necessary to serve the compelling state interest in deterring corruption, we are compelled to conclude that

[14] Neither the utilization of candidate issue questionnaires as a tool to achieve such correlation nor the propriety of such questionnaires in the fundraising and lobbying process was presented to the district court and we do not reach the issue.

Rue is entitled to summary judgment. A fortiori, we hold that the evidence in Homans' case, which need not be viewed in the light most favorable to the City, fails to sustain the City's burden.

2

Thus far, the Supreme Court has recognized the existence of but one state interest sufficiently compelling to justify campaign-finance regulation: the anti-corruption rationale. *See NC-PAC,* 470 U.S. at 496-97, 105 S.Ct. 1459. This initial recognition does not, of course, foreclose the possibility that other compelling state interests may be identified in future cases, and in the case on review Albuquerque submits evidence of additional interests that it claims justify campaign expenditure caps. The City argues that the caps are necessary to serve the compelling state interest of preserving officeholders' time and enabling them to perform official duties. Claiming that "when campaign spending is unlimited, as is true for congressional elections, fundraising becomes a full-time job for candidates and officeholders fearful of being outmatched by an opponent's spending," the city submits evidence documenting the fundraising burdens of candidates and officeholders. (Homans Appellant's Br. at 52; Rue Appellant's Br. at 54.)

In *Kruse,* the Sixth Circuit concluded that the need to preserve officeholders' time and ability to perform official duties is merely a restatement of the containing-skyrocketing-campaign-costs rationale rejected in *Buckley:*

> The need to spend a large amount of time fundraising is a direct outgrowth of the high cost of campaigns. However, because the government cannot constitutionally

> limit the cost of campaigns, the need to spend time raising money, which admittedly detracts an officeholder from doing her job, cannot serve as a basis for limiting campaign spending.

142 F.3d at 916-17. We view the *Kruse* court's conflation of the two rationales as inaccurate and conclude that the preservation of officeholders' time is wholly separate. In *Buckley,* the Court rejected the proffered rationale of containing the skyrocketing costs of campaigns as follows: "[T]he *mere* growth in the cost of federal election campaigns *in and of itself* provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns." 424 U.S. at 57, 96 S.Ct. 612 (emphasis added). Albuquerque does not merely rely on the skyrocketing costs of campaigns in and of themselves; rather, the City cites an additional reason why increasingly expensive campaigns hurt the electoral system: the woes of poor challengers aside, such campaigns distract *officeholders* from performing their official duties. *Buckley* makes no mention of this rationale and thus does not necessarily preclude the recognition of this as a compelling state interest.

To show that its campaign-expenditure limits are *necessary* to further this interest, Albuquerque submits excerpts from the book *Speaking Freely* containing interviews of retired congressional representatives that present a disturbing view into the fundraising pressures imposed on federal candidates. Additionally, the City cites statements made by local officials describing the time pressures imposed by fundraising in the absence of expenditure limits. Dede Feldman, a New Mexico State Senator who also ran for Albuquerque City Council in 1995, compares

the differences in state campaigns versus Albuquerque campaigns:

> Campaigning with and without spending limits is very different. . . . Because there was unlimited spending and I had to raise more money in the Senate races, I spent a lot more time fund-raising and I tried to raise money from larger contributions. . . . Doing so much fund-raising was incredibly time-consuming and cut into my other campaigning and my regular job. The fund-raising had to be done during the day and I therefore had less time to do my regular job. In addition, I had less time to engage in direct contact with the voters by going door-to-door.

(2 Rue R. Doc. 47 at 708-09.) In discussing the fundraising burden imposed during the recent election for which spending limits were enjoined, former mayor Jim Baca comments, "As a result of this new money chase in this year's mayoral election in Albuquerque, I am now forced to spend three hours every day making fundraising phone calls. I have never before had to do this in my political career." (2 Homans Doc. 24 at 512.) On the other hand, other evidence in the record suggests that the strain on Albuquerque officials' time in the absence of spending limits is not significantly greater than when a spending limit is in place. For example, Michael Guerrero, who entered the 1999 City Council race while the spending limit was in place, testified that he spent between ten to fifteen hours per week raising funds.

Limited to the record before us, we cannot conclude that Albuquerque has submitted sufficient evidence to demonstrate that candidate-expenditure caps are necessary to further the state's interest in protecting officials' abilities to conduct their jobs. While it may seem so to

candidates at the time, we are not convinced that the burdens imposed on Albuquerque officeholders' time amounts to a problem of constitutional proportions. The claim that fundraising prevents officeholders from engaging in alternative campaign tactics such as individual door-to-door contact is interesting. Albuquerque does not articulate any reason why there is a compelling state interest in channeling campaign resources to favor individual voter contact rather than fundraising tactics. There is no indication in the record that, for example, the added burden of fundraising events and phone calls is more demanding on an officeholder's time than the burden of individual voter contact.

Nor does the record persuade us that individual voter contact is a fundamentally superior campaign strategy because fundraising efforts compromise an officeholder's ability to communicate with the public. Given the individual contribution-limits in Albuquerque, officeholders are likely to communicate with a broad swath of potential fundraisers in much the same way they would communicate with the public through door-to-door contact; records of past campaign contributors do not suggest that the target for contribution solicitations differs significantly from the general Albuquerque public at large. On the contrary, candidate Guerrero states that time spent on fundraising cannot be distinguished from time spent on other campaign tactics because "a lot of times when you're fund-raising, you're also campaigning." (3 Rue R. Doc. 52 at 760.) We take this to mean that the message disseminated in fundraising efforts often coincides with the message disseminated through voter contact – they are generally one and the same; the City makes no effort to rebut this assumption. For these reasons, we hold that

Albuquerque's evidence, even when viewed in the light most favorable to the City, fails to demonstrate that expenditure limits are necessary to further a compelling state interest in preserving officeholders' time.

3

Finally, the City argues that campaign-spending limits are necessary to further the state interest in promoting electoral competition. One expert in the field of campaign-finance reform explains:

> Electoral competition is another central component of democratic governance. In many respects, the ultimate weapon of public accountability in a democratic system is the ability of citizens to remove political actors through elections. And, electoral competition is the mechanism that keeps accountability viable. . . . High levels of campaign spending poses a threat to such competition because large incumbent war chests tend to discourage serious challengers.

(2 Rue R. Doc. 43 at 674.) Homans argues that this merely rehashes the equalization-of-candidate-resources rationale rejected in *Buckley.*[15] *See Buckley,* 424 U.S. at 56, 96 S.Ct. 612 (rejecting the argument that equalizing candidates' resources constitutes a compelling state interest). In *Buckley,* however, the Court spoke solely to the equalization of candidate *resources;* it did not address the possible rationale of improving electoral competition. *Id.* at 48-49, 56-57, 96 S.Ct. 612. We are persuaded that the improvement of electoral competition constitutes an interest distinct from the equalization-of-candidate-resources rationale rejected

[15] Notably, Rue does not raise this argument.

in *Buckley.* Thus, nothing precludes this court from recognizing robust electoral competition as a state interest sufficiently compelling to justify the expenditure limits.

We do not resolve this question because there is insufficient evidence in the record, even when viewed in the light most favorable to the City, to establish that spending limits actually enhance electoral competition. While the City's statistical evidence does tend to undercut the doomsday prediction that spending limits discourage competition by insulating incumbents, it falls short of proving the contrary – that spending limits actually *improve* electoral competition – as the City's own expert admits. Even were we to assume that enhancement of electoral competition constitutes a compelling state interest, there is insufficient evidence in this record to show that expenditure limits serve this end.

B

We conclude that Albuquerque's evidence, even when viewed in the light most favorable to the City, fails to establish that its candidate-expenditure limits are necessary to serve a compelling state interest. Thus, summary judgment in favor of Rue was proper. It follows that the City's evidence in *Homans III,* which need not be viewed in the light most favorable to Albuquerque, fails to sustain its burden, and the permanent injunction was appropriately granted. Given these holdings, we have no occasion to determine whether the expenditure limits are narrowly tailored. It is clear from the record, and from the many other cases dealing with the problem, that there is an increasing drive, and need, for campaign finance reform. We do not intend by our holding – that Albuquerque has

failed in the instant case to demonstrate a compelling state interest for its expenditure provisions – to discourage future efforts in reforming our electoral system; we merely hold that on the record before us, Albuquerque has failed to justify its expenditure limits.

Other jurisdictions have attempted alternative measures to eradicate corruption: limiting the size of campaign contributions, improvement of electoral competition, enhancement of voter participation, and preservation of candidates' scarce time resources, and they have done so within constitutional bounds. Notably, the Court has stated that public financing measures including expenditure limits may be implemented to achieve these ends without running afoul of the First Amendment. *See Buckley,* 424 U.S. at 57 n. 65, 96 S.Ct. 612 ("Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations."). As for the prescription before us – a rigid limitation of campaign expenditures – Albuquerque has failed to submit sufficient evidence of a compelling state interest justifying such limits.

For the foregoing reasons, we **AFFIRM** both decisions of the district court.

TYMKOVICH, J., affirming, concurring in part and concurring in the result. O'BRIEN, J. joins.

I agree with much of Judge Lucero's analysis and with the ultimate disposition of the issues on appeal. Specifically, I concur with Parts I, II, and III, and with the analysis of Part IV that is not inconsistent with the

following.[1] I write separately for two reasons: First, to explain what I view as the Supreme Court's narrow application of *Buckley's* anti-corruption rationale in campaign expenditure cases. Second, to demonstrate why the other rationales submitted by the City – preservation of officeholder time and promoting electoral competition – are fundamentally at odds with *Buckley* and its progeny.

The principal opinion's careful analysis of the evidence presented by Albuquerque leads it to the undoubtedly correct conclusion that the City's campaign spending restrictions are unconstitutional. I, however, would agree with the Sixth Circuit's holding that under *Buckley* such restrictions cannot be supported as a matter of law. *See Kruse v. City of Cincinnati,* 142 F.3d 907, 915-19 (6th Cir.1998). In particular, I would hold that while prevention of corruption has been recognized as a compelling interest justifying campaign contribution limits, it was specifically rejected by *Buckley* as a sufficient reason to limit direct campaign spending. Further, in my view the two "new" interests the City asserts in defense of the statute are neither new nor compelling, nor are the spending caps tailored narrowly to serve them. Since all three of the asserted interests are thus constitutionally incapable of justifying spending restrictions as a matter of law, the court need not entertain the evidence submitted by the City.

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[1] I refer to Judge Lucero's opinion as the "principal opinion" because the three judge panel is unanimous in its agreement on the result, and note that this opinion is the majority only as to Part IV.

Strict Scrutiny and Buckley v. Valeo

It is true that strict scrutiny does not require automatic invalidation of governmental regulations. *See Grutter v. Bollinger,* 539 U.S. 306, 123 S.Ct. 2325, 2338, 156 L.Ed.2d 304 (2003). Nevertheless, where core First Amendment principles are at stake, courts must bring a healthy skepticism to claims that individuals spend too much time and money on the political process. Unless the City convinces us that its regulations are necessary to serve a compelling interest, *see Federal Election Comm'n v. Mass. Citizens for Life, Inc.,* 479 U.S. 238, 251-52, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986), and are narrowly tailored to serve that interest, we must invalidate them. *See Federal Election Comm'n v. Nat'l Conservative Political Action Comm.,* 470 U.S. 480, 496, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985) ("NCPAC").

While I agree it is theoretically possible to bring evidence of corruption in support of spending limitations under *Buckley,* we should be careful not to credit attempts to reformulate arguments that the Supreme Court rejected long ago. *Buckley's* strong affirmation of the free speech rights associated with campaign spending has remained essentially untouched for nearly thirty years. *See McConnell v. Fed. Election Comm'n,* ___ U.S. ___, 124 S.Ct. 619, 655, 157 L.Ed.2d 491 (2003) (reemphasizing heightened level of scrutiny for restrictions on campaign expenditures). Its central holding on expenditures has stood the test of time, both from judicial tinkering and legislative onslaught. That Albuquerque's spending caps have evaded judicial review for more than 25 years is quite a feat. After careful deliberation, however, the City's limits cannot stand under well-established precedent.

I agree that the *Buckley* Court did not adopt a per se rule against campaign spending limits. The Court began by explaining the particular importance of First Amendment rights in the arena of political campaigning:

> In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971), "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

Buckley, 424 U.S. at 14-15, 96 S.Ct. 612.

The Court went on to address specifically how spending limits impinge upon this right:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

Id. at 19, 96 S.Ct. 612 (footnote omitted). It concluded with a broad holding that government does not have the right to pass judgment on how or why a person expends campaign resources:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government but

> the people – individually as citizens and candidates and collectively as associations and political committees – who must retain control over the quantity and range of debate on public issues in a political campaign.

Id. at 57, 96 S.Ct. 612.

As Justice White observed in dissent, this is not the language of a Court limiting its decision to the facts before it, or interested in encouraging governments to enact similar restrictions with more elaborate justifications. *See id.* at 266, 96 S.Ct. 612 ("The Court . . . holds that a candidate has a constitutional right to spend unlimited amounts of money, mostly that of other people, in order to be elected.") (White, J., dissenting).

The hundreds of pages of campaign finance opinions written by the Supreme Court beginning with *Buckley* and culminating most recently with *McConnell* may not have left us with many clear rules, but one remains intact: "The central holding in [*Buckley*] is that spending money on one's own speech must be permitted. . . . " *Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n,* 518 U.S. 604, 627, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996) (Kennedy, J., concurring in part and dissenting in part). Thus, the Supreme Court has "*routinely* struck down limitations on independent expenditures by candidates." *Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.,* 533 U.S. 431, 441, 121 S.Ct. 2351, 150 L.Ed.2d 461 (2001) ("*Colorado II*") (emphasis added); *see also McConnell,* 124 S.Ct. at 655 (reiterating that expenditure limitations will be more closely scrutinized).

One can safely conclude that *Buckley* forecloses a finding that spending limitations can be narrowly tailored

to further governmental justifications other than the anti-corruption interest sustained by the Supreme Court, no matter what evidence may be presented. In short, the City must do more than offer academic distinctions of the rationales rejected in *Buckley.* Albuquerque failed to do so here.

Corruption and Campaign Expenditures

While I agree with the principal opinion that strict scrutiny does not establish a "per se" restriction on campaign spending schemes, it does set a high standard. The Supreme Court likens "corruption" to the "subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors." *NCPAC,* 470 U.S. at 497, 105 S.Ct. 1459. Nevertheless, while the Supreme Court has routinely upheld contribution limits under the corruption rationale, it has equally routinely struck down spending restrictions. *See Colorado II,* 533 U.S. at 440-41, 121 S.Ct. 2351. The reason for the difference is the Court's determination – grounded in law and common sense – that expenditures by a candidate to promote the candidate's political agenda do not pose a particular risk of corrupting the *candidate* making the expenditure.

While more recent cases appear to have taken a slightly broader view of the corruption rationale on the contribution limits side of the equation, *see, e.g., Nixon v. Shrink Missouri Gov't PAC,* 528 U.S. 377, 389, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (expressing concern about

"the broader threat from politicians too compliant with the wishes of large contributors"), the Supreme Court as a whole has not yet shown any willingness to do so on the spending side. The Supreme Court's skeptical view of spending limitations in *Buckley* is based on a realistic appraisal of modern campaigning. Conveying a campaign message to a large electorate can be costly, whether it is by direct mail, television, radio, or staged events. *See Buckley,* 424 U.S. at 19-20, 96 S.Ct. 612. While technological innovations such as the internet may make it more economical to reach some segments of the electorate, overall costs are unlikely to go down anytime soon. The bottom line is that political speech can only be communicated where a candidate has the resources to get his views out. *See id.* at 19, 57, 96 S.Ct. 612.

The quality of contemporary political communications may give us pause, but the First Amendment does not have an exception for messages we find repetitive, in poor taste, or too hard-hitting. The answer to concerns about political campaigning, however, does not rest in arbitrary limits that reduce the amount of speech available to the public with no reduction in real or perceived corruption by candidates or elected officials.[2] The Supreme Court has made it clear that a *candidate's* expressing his political views is not corrupting: "There is nothing invidious,

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[2] This is to say nothing of the inevitable unintended consequences. Some commentators suggest that a possible consequence of spending restrictions will be to drive political spending further out of the control of candidates and into the hands of independent groups. *See generally* Lillian R. BeVier, *Money and Politics, A Perspective on the First Amendment and Campaign Finance Reform,* 73 Calif. L.Rev. 1045 (1985) (noting that campaign finance reform has increased influence of interest groups).

improper, or unhealthy in permitting [legally-raised] funds to be spent to carry the candidate's message to the electorate." *Id.* at 56, 96 S.Ct. 612. In other words, the candidate's spending does nothing to corrupt the candidate. "If a[ ] candidate can raise $1 from each voter, what evil is exacerbated by allowing that candidate to use all that money for political communication?" *Id.* at 56 n. 64, 96 S.Ct. 612 (quoting *Buckley v. Valeo,* 519 F.2d 821, 917 (D.C.Cir.1975) (Tamm, J., dissenting in part)). Thus, candidate spending limitations cannot be justified by the anti-corruption rationale. *Id.* at 55-57, 96 S.Ct. 612. This is because "[t]he markedly greater burden on basic freedoms caused by [spending limits] cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limits." *Id.* at 44, 96 S.Ct. 612.

There is no basis to retreat from *Buckley's* essential teaching that campaign spending restrictions are not narrowly tailored to further the governmental interest in reducing corruption. I therefore agree with the Sixth Circuit that "campaign spending limits cannot be justified by the anti-corruption rationale." *Kruse,* 142 F.3d at 915. Thus, while Judge Lucero is correct in finding that Albuquerque put forth insufficient evidence to show that its spending limits were necessary to prevent corruption, I doubt that any evidence would sustain such limitations under *Buckley.*

Fund-raising Burdens on Candidates

Albuquerque advances a second rationale for spending caps: they relieve elected officials of the heavy burden of raising the money they need to spend to get reelected. The

principal opinion disagrees with Homans's and Rue's argument that this is simply a reformulation of the cost-control rationale considered and rejected by the Supreme Court in *Buckley*. The opinion distinguishes *Buckley*'s holding that the "allegedly skyrocketing cost of political campaigns" is not an interest that can support spending restrictions, 424 U.S. at 57, 96 S.Ct. 612, by concluding that the *Buckley* Court was concerned only with "the woes of poor challengers," not the distractions faced by office-holders. *Supra* at 912.

It is true that the woes of underfunded challengers and the distractions of officeholders are not the same, and *Buckley* does not explicitly mention the latter. Both concerns are, however, aspects of the broader interest in controlling the costs of campaigns, an issue the *Buckley* Court did consider and firmly reject. The Court said, "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." *Buckley,* 424 U.S. at 57, 96 S.Ct. 612. This is not limited to protecting the interests of underfunded challengers. The Court is clearly and explicitly addressing whether the government may wrest from "the people – individually as citizens and candidates and collectively as associations and political committees – control over the quantity and range of debate on public issues in a political campaign" because it feels the time and money spent on campaigns could be better utilized on other endeavors. *Id.* If the "*mere* growth" of the cost of campaigns "provides *no* basis for governmental restrictions on the quantity of campaign spending," *see id.* (emphasis added), a mere consequence of that growth – more time spent fund-raising – certainly cannot provide such a basis. This is so even if Albuquerque's city councilors believe

candidates are spending wasteful, excessive, or unwise amounts of money on their campaigns or if candidates would prefer to have more time for other activities.

Because *Buckley* rejected this broad argument in favor of spending caps, it did not need to address each of the numerous subordinate arguments the parties in that case put forth. But it is worth noting that contrary to the City's contention the *Buckley* Court did consider the exact argument made here, that the "thirst for money has forced candidates to divert time and energy to fund-raising and away from other activities, such as addressing the substantive issues." *Buckley,* Br. of Appellees Center for Public Financing of Elections, Common Cause, League of Women Voters of the United States at 72-73 (quoting Senator Humphrey: "Campaign financing is a curse. It's the most disgusting, demeaning, disenchanting, debilitating experience of a politician's life. It's stinky. It's lousy. I just can't tell you how much I hate it.").

Since *Buckley* is directly controlling, I would again agree with the Sixth Circuit and reject this proposed justification without reaching the details of Albuquerque's arguments. *See Kruse,* 142 F.3d at 916-17 ("[T]he need to spend time raising money, which admittedly detracts an officeholder from doing her job, cannot serve as a basis for limiting campaign spending.").

The principal opinion nonetheless deals effectively with the City's factual arguments on this point. That legislators might wish to free themselves from the pressures of fund-raising is not surprising. Fund-raising is hard work and can be quite time consuming. Few candidates reportedly like it. What is surprising is that many commentators, normally so exacting in their criticism of

the self-dealing of the political branches, are willing to accept the most optimistic projections about reform proposals' likely effects. *See generally* Lillian R. BeVier, *What Ails Us?*, 112 Yale L.J. 1135, 1138 (2003) (commenting on how most campaign finance proposals miss the reformers' target).

The principal opinion is quite right that the City presented no plausible evidence that the quality of municipal governance or legislation had been harmed by inattentive law makers, nor that elected officials' work product would substantially improve because the officials could spend more time on the job. It is doubtful that Albuquerque's elected officials would admit that they have been unable to provide quality governance despite the rigors of campaigning. In any event, courts are not in a position to make such judgments about the quality of legislation based on such an illusory rationale. *See Buckley,* 424 U.S. at 57, 96 S.Ct. 612.

Furthermore, contrary to former Mayor Baca's concerns about the increased burdens of fund-raising (itself an echo of the complaints of the appellees in *Buckley*), officeholders are not "forced" to spend any time making calls or otherwise seeking funds.[3] That they choose to do so (allegedly at the expense of their other duties) seems to be a rather weak reason to override core First Amendment

[3] Not only are officeholders not required to run for reelection if they feel it interferes with their ability to represent their constituents, but if political advertisements are as ineffectual at informing voters as the City here seems to claim, *see* Rue Appellant's Br. at 15-17, then surely a rational candidate would not waste much time raising money to pay for them.

concerns. Freeing politicians from having to make that choice is not a compelling governmental interest.

Finally, of course, whatever the merits of spending limits, they must be narrowly tailored to further the constitutional justification. By way of example, as the principal opinion notes, an approach whose constitutionality has been sanctioned by *Buckley* is an obvious solution. *Buckley* upheld voluntary spending limits on presidential campaigns where the candidate accepts public funds. 424 U.S. at 85-86, 96 S.Ct. 612. If the City's elected officials and its voters truly feel obliged to limit campaign spending, they should be willing to put their money (tax dollars) where their mouths are. A public funding scheme would presumably take fund-raising pressure off of elected officials and also allow challengers to forego the rigors of purely private fund-raising. Another approach would be to raise limits on *contributions*. Candidates could then save time by seeking fewer, larger, donations. Not only would this free up candidates' time, but it would also lessen any pressure to evade low contribution limits. Albuquerque's contribution limits are currently set at five percent of the spending caps; while the record does not disclose the governmental rationale for this formula, there is no reason the City could not revisit these limits in response to the realities of modern campaigning. State and local governments are also free to limit the number of times an individual can run for the same office. Another simple solution would be to expand the number of seats in a given elective body, in this case the Albuquerque City Council. With fewer constituents to represent, and fewer potential voters to persuade, candidates would have to spend less time on all forms of campaigning, including fund-raising.

In short, Albuquerque's restrictions do not further the objective of reducing corruption. Nor are they "closely drawn" in light of the many alternatives that are not constitutionally suspect. They accordingly do not comport with the plain teaching of *Buckley.*

Electoral Competition

Albuquerque's final constitutional justification is that spending limits are necessary to promote electoral competition. Once again, I agree with the conclusion of the principal opinion – that Albuquerque has failed to show that this interest is served by its spending limits. I do not believe *Buckley,* however, allows us to entertain this interest as a proposed rationale for spending limits.

Albuquerque's argument is that "campaign spending poses a threat to [electoral] competition because large incumbent war chests tend to discourage serious challengers." *Supra* at 913-914. Thus, the City contends that spending caps are needed to equalize candidate resources, which in turn may improve electoral competition. This interest, like the others urged on us here, however, was considered and rejected by the *Buckley* Court. Addressing the argument that spending limits are necessary "to equalize the relative ability of individuals and groups to influence the outcome of elections," the Court stated,

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

424 U.S. at 48-49, 96 S.Ct. 612 (quotations omitted). The Supreme Court couched its language broadly in response to the argument that spending caps are necessary to "encourage participation as candidates by many who in the past remained inactive on the ground that, inevitably, they could not compete against the established fund-raiser." *Buckley,* Br. of Attorney General & FEC at 36.[4] The *Buckley* Court, however, rejected this claim: "[E]qualization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." 424 U.S. at 56-57, 96 S.Ct. 612.

Thus, I believe *Buckley* does effectively "preclude[] this court from recognizing robust electoral competition as a state interest sufficiently compelling to justify the expenditure limits." *Cf. supra* at 913-914. Because the Supreme Court has rejected this proposed rationale, this court should make clear to trial courts and future potential litigants that time and money spent attempting to build a record justifying spending restrictions based on this argument would be wasted.

Even if encouraging competition were a compelling interest, many of the alternative proposals identified above would be less restrictive means of serving this interest. For example, increasing the number of seats, limiting the number of terms individuals can serve, raising contribution limits, and supplementing private

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[4] This argument undermines Albuquerque's claim that campaign spending is not important for challengers hoping to inform or persuade voters because communication with likely voters is not expensive. *See* Rue Aplt. Br. at 16-17, 62-63.

donations with public funds all could help relatively unknown candidates amass the resources necessary to challenge a sitting officeholder without impinging on the First Amendment.

Conclusion

The principal opinion correctly notes that *Buckley* is the starting point for analysis in any campaign finance case. In this case, *Buckley* is also the endpoint because *Buckley* itself precludes our recognition of the reformulated interests urged on us by Albuquerque. Besides this imposing legal impediment, I see two possible consequences of the principal opinion's analysis: First, it would encourage additional attempts by governments to abridge citizens' rights to engage in (sometimes expensive) political speech through artful restatements of the governmental interests rejected in *Buckley*. Second, by couching its decision on the lack of a sufficient record, rather than on the protections of the First Amendment, the principal opinion tempts heavy reliance on surveys, statistical analysis, and other time-consuming and costly forms of record building when the inevitable litigation arises from those abridgments. The Supreme Court has given us little reason to expect that new criticism of the high cost of politics will undercut the central holding of Buckley that most spending limitations are constitutionally foreclosed by the First Amendment.

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217 F.Supp.2d 1197

United States District Court,
D. New Mexico.

Rick HOMANS, Plaintiff,

v.

The CITY OF ALBUQUERQUE, a Municipal Corporation and Margie Baca Archuleta in her capacity as Clerk of the City of Albuquerque, Defendants.

No. CIV. 01-917 MV/RLP.

Aug. 22, 2002.

Rick L. Alvidrez, Keleher & McLeod, Albuquerque, NM, for plaintiff.

Randy M. Autio, Dan Ramczyk, Albuquerque City Attorney's Office, Albuquerque, NM, Brenda Wright, John C. Bonifaz, National Voting Rights Inst., Boston, MA, for defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

VAZQUEZ, District Judge.

THIS MATTER is before the Court on the parties' Joint Motion for Stipulated Admission of Evidence, Briefing Schedule and Expedited Determination on the Merits **[Doc. No. 35]**. The Court, having considered the motion, the pleadings, testimony in connection with plaintiff's motion for a preliminary injunction, joint stipulation of certain evidence for expedited determination on the merits, exhibits, relevant law, and being otherwise fully informed, finds that the parties' joint motion is well-taken

and will be **GRANTED**, and that, under the Tenth Circuit's interpretation of *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), plaintiff is entitled to (1) a declaratory judgment that Article XIII, Section 4(d)(2) of the Albuquerque City Charter violates the First Amendment to the United States Constitution and (2) a permanent injunction enjoining the enforcement of the expenditure limitations under Article XIII, Section 4(d)(2) of the Albuquerque City Charter.

I. BACKGROUND

Rick Homans was a duly qualified candidate for Mayor in the City of Albuquerque, New Mexico (the "City"), whose name appeared on the printed ballot for the mayoral election held October 2, 2001. Mr. Homans brought this action seeking a declaratory judgment that Article XIII, Section 4(d)(2) of the Albuquerque City Charter (the "City Charter") violates the First Amendment to the United States Constitution. That Section states:

> (d) No candidate shall allow contributions or make expenditures in excess of the following for any election:
>
> * * *
>
> (2) To a candidate for the office of Mayor contributions or expenditures equal to twice the amount of the annual salary paid by the City of Albuquerque to the Mayor as of the date of filing of the Declaration of Candidacy.

The annual salary of the Mayor in office at the time of the October 2, 2001 election was $87,360. Therefore, the expenditure limitation for the October 2, 2001 mayoral election was $174,720. Under the terms of the City Charter,

Article XIII, Section 4(d)(2), Mr. Homans was subject to a $500 fine for each violation of the expenditure limitations, and, if he had won the election, would have been subject to potential public reprimand and removal from office by the City Council for any such violation.

Prior to Mr. Homans's registration of his candidacy for Mayor, a state court issued a preliminary injunction which prevented enforcement of the expenditure limitations at issue herein. When Mr. Homans received informational materials from the City regarding his candidacy, he was verbally informed by a City employee that the expenditure limits would not be enforced. Three voters had brought the state court action. A candidate intervened in the action and argued that the voters lacked standing to bring suit. The state court agreed and gave the candidates twenty days to join the lawsuit before it would be dismissed for lack of standing. Neither Mr. Homans nor any other candidate joined, and the case was dismissed on August 15, 2001.

Plaintiff commenced the instant action, filing a complaint for declaratory judgment and injunctive relief **[Doc. No. 1],** on August 10, 2001. Thereafter, on August 13, 2001, plaintiff filed a motion for a preliminary injunction and a temporary restraining order **[Doc. No. 3],** seeking an order enjoining enforcement of the expenditure limitation provision of the City Charter. In support of his motions, Mr. Homans claimed that the City Charter was an unconstitutional infringement on his First Amendment rights. He contended that, in reliance on a City employee's assertion that the limits would not be enforced in this election, he had already exceeded the City Charter's expenditure limits. He further claimed that if the expenditure limits were not enjoined, he would have to stop

campaigning and close his campaign headquarters. The City maintained that the City Charter was a constitutional limitation on campaign spending and that enforcement of the limitation would not cause Mr. Homans irreparable injury.

This Court held a hearing on August 20, 2001, for the purpose of determining whether Mr. Homans was entitled to temporary injunctive relief. Based on the record before the Court at that time, the Court found that Mr. Homans had shown a likelihood of success on the merits of his claim that the City Charter violated the First Amendment, that he would suffer irreparable harm if enforcement of the City Charter were not enjoined, and that the balance of harms and the public interest weighed in his favor. Thus, the Court granted Mr. Homans's motion for temporary injunctive relief **[Doc. No. 17]**.

The Court held another hearing on August 30, 2001, for the purpose of determining whether Mr. Homans was entitled to preliminary injunctive relief. By this time, the Court had had the opportunity to review the evidence submitted by the City in opposition to Mr. Homans's motion. At the hearing, the Court heard the testimony of Mr. Larry Makinson, an expert on election reform from the Center for Responsive Politics. The Court also heard argument from counsel for both parties on the issue of whether Mr. Homans was entitled to preliminary injunctive relief.

After the second hearing, the Court denied Mr. Homans's request for a preliminary injunction, finding that Mr. Homans had not shown a likelihood of prevailing on the merits ("Preliminary Injunction Memorandum Opinion") **[Doc. No. 21]**. The Court determined that

Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), did not present an absolute bar to expenditure limits, and that the relevant City Charter expenditure provision was narrowly tailored to meet the compelling governmental interests of preserving the public faith in democracy and reducing the appearance of corruption. The Court further found that Mr. Homans had made a sufficient showing of irreparable harm, that the balance of harms weighed in favor of Mr. Homans, and that the public interest favored the City.

On September 4, 2001, Mr. Homans filed an interlocutory appeal of this Court's denial of a preliminary injunction **[Doc. No. 25].** Mr. Homans also filed with the Tenth Circuit Court of Appeals an emergency motion for an injunction pending appeal, and an alternative motion for suspension of the appellate rules and expedited review of the district court's denial of his application for a preliminary injunction. In a *per curiam* order dated September 6, 2001, the Tenth Circuit granted Mr. Homans's emergency motion for an injunction pending appeal, and enjoined the City from further enforcing Article XIII, Section 4(d)(2) of the City Charter. The Tenth Circuit found that Mr. Homans had demonstrated a substantial likelihood of success on the merits on his First Amendment claim that campaign expenditure limitations are unconstitutional. Additionally, the Tenth Circuit agreed with this Court's findings that Mr. Homans had made a sufficient showing of irreparable harm and that the balance of harms weighed in favor of Mr. Homans.

Thereafter, based on the parties' agreement, the Tenth Circuit suspended the appeal pending entry of final judgment in this Court **[Doc. No. 29].** The parties then filed a joint motion for stipulated admission of evidence,

briefing schedule and expedited determination on the merits **[Doc. No. 35],** requesting, *inter alia,* that this matter be decided on the merits without a trial based upon the evidentiary record developed in connection with Mr. Homans's motion for temporary restraining order and motion for preliminary injunction. The parties further agreed to the admission of the evidence and factual stipulations set forth in the parties' joint stipulation for admission of certain evidence for expedited determination on the merits ("Stip.") **[Doc. No. 36],** which was filed simultaneously with the joint motion.

II. FINDINGS OF FACT

1. Mr. Homans is a resident of the City. Stip. at ¶ 1.

2. The City is a municipal corporation organized under the laws of the State of New Mexico and is a "person" within the meaning of 42 U.S.C. § 1983. Stip. at ¶ 2.

3. Francie D. Cordova is the Clerk of the City (the "Clerk") and is charged with enforcement of certain ordinances relating to City elections and is a "person" within the meaning of 42 U.S.C. § 1983. Ms. Cordova succeeded defendant Margie Baca Archuleta as the Clerk on December 1, 2001. Stip. at ¶ 3.

4. The City's expenditure limits were enacted in 1974. Stip. at ¶ 12, Def.Ex. 1 at 4.

5. Limits on candidate spending remained in effect for each mayoral and city council election held from 1974 through 1995. Stip. at ¶ 13.

6. The spending limits were temporarily enjoined for the 1997 elections by a court order in *Murphy v. City of*

Albuquerque, No. CV-97-0007826 (2d Judicial Dist.). Stip. at ¶ 14.

7. Studies of the temporary removal of the limits show a correlation to a significant decrease in voter turnout. *See* Def.Ex. 1 at 8.

8. The spending limits were restored for the 1999 city council elections after the plaintiffs in *Murphy* withdrew their lawsuit through a stipulated dismissal. Stip. at ¶ 15.

9. The City Charter was amended in 1999 to permit candidates for Mayor and city council to spend up to twice the annual salary of the office in their election campaigns. Stip. at ¶ 16.

10. The City is one of the few remaining cities in the United States that limits the amount of money a candidate for political office may spend on his or her own campaign. *See* John C. Bonifaz, et al., *Challenging Buckley v. Valeo: A Legal Strategy,* 33 Akron L.Rev. 39, 56 (1999).

11. A system of unlimited spending has deleterious effects on the competitiveness of elections because it gives incumbent candidates an electoral advantage. *See* Tr. at 37-44.

12. Nationwide, eighty-eight percent (88%) of incumbent Mayors successfully sought reelection in 1999. *See* Def.Ex. 1 at 6. In contrast, since 1974, the City has had a zero percent (0%) success rate for Mayors seeking reelection. *See id.*

13. Many successful candidates for the office of Mayor of the City have spent far less than the maximum expenditure allowed. *See* Def.Exs. 10 & 11.

14. The prior Mayor of the City, Jim Baca, ran a successful campaign for Mayor in 1997, winning the election after spending only $43,888.26 on television advertising. *See* Def.Ex 9, ¶ 3. During that campaign, Mayor Baca relied primarily on grassroots outreach rather than on television advertising. *See id.* at ¶¶ 2-3.

15. Between 1991 and 1995, in Cincinnati, where there are no expenditure limits, forty-five percent (45%) of all funds raised for elections came from donors contributing a minimum of $1,000.00. Between 1989 and 1997, in the City, which imposed expenditure limits, only twenty-seven percent (27%) of all funds raised came from donors contributing a minimum of $1,000.00. *See* Tr. at 45; Def.Ex. 20.

16. In Cincinnati's 1995 elections, fifty-three percent (53%) of all funds raised for elections came from donors contributing at least $1,000.00, whereas only six percent (6%) of the funds raised came from donors contributing less than $100.00. In the City's 1995 elections, by contrast, twenty-seven percent (27%) of all funds raised came from donors contributing a minimum of $1,000.00 and thirteen percent (13%) of all funds raised came from donors contributing less than $100.00. *See* Tr. at 46; Def.Ex. 21.

17. In the last federal Congressional election, in more than half the Congressional districts in the country, the winning candidate outspent the losing candidate by a factor of ten to one or more. *See* Tr. at 20-21.

18. As the cost of elections rise, candidates for office at every level of federal, state, and city government are under a great deal of pressure to engage in fundraising activities and to depend on the goodwill of their donors. *See id.* at 22-23.

19. Voter turnout for all of the City's elections between 1974 and 1999 was approximately forty percent (40%). *See* Def.Ex. 1 at 7. Voter turnout for cities without expenditure limits is generally between twenty-five percent (25%) to thirty-five percent (35%). *Id.* Voter turnout in the City is generally higher than most major cities. *See id.* at 7-8.

20. Campaigns where there are no spending limits in place tend to reduce the number of lower-income to lower-middle-income citizens who can run for office with some expectation of winning. *See id.* at 10.

21. A spending gap between incumbents and challengers generally results in diminished competitiveness in elections. *See id.* at 11.

22. Candidates in elections where spending limits are imposed tend to spend more campaign money on actual voter contact. *See id.* at 14.

23. A survey of the City's voters shows that most voters consider newspaper coverage, public debates and forums, seeing the candidate in person, and radio and television news coverage more important than radio and television advertisements. *See* Def.Ex. 2 at 2.

24. Fifty-seven percent (57%) of surveyed City voters think that federal elections are overly influenced by special interest money. In contrast, only twenty-three percent (23%) think that the City elections are overly influenced by special interest money. *See* Def.Ex. 2 at 3. Forty-nine percent (49%) think that only candidates with access to large sums of money are able to run for federal office and win. *See id.* Only five percent (5%) think that

ordinary citizens are able to run for federal office and win. *See id.*

25. Fifty-seven percent (57%) of surveyed City voters strongly favor the current spending limits. *See id.* at 6. Another twenty-five percent (25%) not-so-strongly favor the current spending limits. *See id.* Seventy-one percent (71%) believe that spending limits improve the fairness of elections by ensuring that ordinary citizens, not just the very wealthy, can run for office in the City without having to raise so much money from special interest groups. *See id.*

26. Unlimited spending on mayoral races has a detrimental impact on the local electoral process. *See* Def.Ex. 9 at ¶¶ 4-6.

27. In the last twenty-five years, the cost of running for a seat In the United States House of Representatives[1] has risen by approximately 400 percent. *See* Tr. at 17. This rise does not reflect simply a rise in the cost of living. *See id.* at 18.

28. Federal contribution limits have not effectively changed the negative public perception of the undue influence of large donors on federal elected officials. *See id.* at 22, 34.

29. It is not difficult for large donors to get around federal and state contribution limits through practices such as "bundling." *See id.* at 26-27.

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[1] There are no limits on campaign spending by candidates for federal offices.

30. Article XIII, Section 4(d)(2) of the City Charter restricts total contributions and expenditures by mayoral candidates as follows:

> (d) No candidate shall allow contributions or make expenditures in excess of the following for any election:
>
> * * *
>
> (2) To a candidate for the office of Mayor contributions or expenditures equal to twice the amount of the annual salary paid by the City of Albuquerque to the Mayor as of the date of filing of the Declaration of Candidacy.

Stip. at ¶ 8.

31. The City Charter and the Rules and Regulations of the Board of Ethics and Campaign Practices give the Board the power to fine a candidate up to $500 for each violation of Article XIII, Section 4(d)(2), to issue a public reprimand to the candidate and to recommend to the City Council that a candidate duly elected by the voters be removed from office. Stip. at ¶ 10.

32. The City was scheduled to have a municipal election, including an election for the office of Mayor, on October 2, 2001. Stip. at ¶ 4.

33. Mr. Homans was a candidate for the office of Mayor of the City, having filed with the City both a Declaration of Candidacy on August 7, 2001, and petitions with in excess of 5,100 valid signatures of registered City voters during the period between July 12 and July 21, 2001. Stip. at ¶ 5.

34. Mr. Homans was a duly qualified candidate for the office of Mayor of the City with sufficient signatures to

be listed as a candidate on the printed ballot for the mayoral election held on October 2, 2001. Stip. at ¶ 6.

35. The salary of the City Mayor at the time of the filing of the declaration of candidacy was $87,360 per year, resulting in a campaign contribution and expenditure limit for a City mayoral campaign of $174,720 under Article XIII, Section 4(d)(2). Stip. at ¶ 9.

36. In furtherance of his candidacy for Mayor, Mr. Homans conducted various fundraising and campaign activities during the several months prior to the October 2, 2001 election. Stip. at ¶ 7.

37. As a result of his campaign activities, Mr. Homans received campaign contributions and pledges in excess of the spending limitations specified under Article XIII, Section 4(d)(2) of the City Charter. App. at 3; Ex. A at ¶ 8.

38. Defendants contend that Article XIII, Section 4(d)(2) of the City Charter is constitutional and announced that they would enforce the contribution and expenditure limitations against candidates for the office of Mayor, including Mr. Homans, in the October 2, 2001 municipal election. Defendants further maintain that they will enforce the contribution and expenditure limitations in future municipal elections. Stip. at ¶ 11.

39. The City held a municipal election on October 2, 2001 for certain city offices, including the office of Mayor. Stip. at ¶ 18.

40. A total of eight candidates sought the office of Mayor in the October 2, 2001 mayoral election. Stip. at ¶ 19.

41. The official and certified results of the October 2, 2001 mayoral election are as follows:

a.	Jim R. Baca	10,999 votes
b.	Martin J. Chavez	30,292 votes
c.	James B. Lewis	6,747 votes
d.	Alan B. Armijo	2,570 votes
e.	Richard W. Homans	9,737 votes
f.	Bob Schwartz	27,490 votes
g.	Mike McEntee	11,176 votes
h.	Kermit D. Vincent	108 votes

Stip. at ¶ 20.

42. Martin J. Chavez was elected Mayor in the October 2, 2001 mayoral election for the City with 30.56% of the vote. Stip. at ¶ 21.

43. Out of 235,152 registered voters, a total of 99,119 voters voted in the October 2, 2001 City mayoral election. Stip. at ¶ 24.

44. Article XIII, Section 4(c) requires candidates in municipal elections to publicly disclose campaign contributions and expenditures by filing four statements, signed under oath, with the following information:

> a. The total of all contributions;
>
> b. The name and residential street address of each contributor, the contributor's principal business occupation, the name and address of the contributor's employer, and the nature of the contributor's or contributor's employer's business, together with the total cumulative cash value contributed by the contributor, when that amount equals or exceeds $25 for the office of Councilor or to a Measure Finance Committee, and $100 for the office of Mayor.
>
> c. All expenditures made on behalf of the campaign, including any reimbursements and the

nature thereof, and the name and address of the person or business to whom payment was made.

Stip. at ¶ 28.

45. According to the Disclosure Statements filed by the candidates for Mayor in the October 2, 2001 election, the candidates received and expended the following amounts:

a.	Jim R. Baca	
	Contributions:	$ 333,937.00
	Expenditures:	$ 341,035.08
b.	Martin J. Chavez	
	Contributions:	$ 421,753.25
	Expenditures:	$ 421,753.25
c.	James B. Lewis	
	Contributions:	$ 61,541.17
	Expenditures:	$ 61,541.18
d.	Alan B. Armijo	
	Contributions:	$ 51,514.09
	Expenditures:	$ 51,603.39
e.	Richard W. Homans	
	Contributions:	$ 579,043.17
	Expenditures:	$ 595,349.46
f.	Bob Schwartz	
	Contributions:	$ 156,003.97
	Expenditures:	$ 154,683.59
g.	Mike McEntee	
	Contributions:	$ 173,699.65
	Expenditures:	$ 159,580.85
h.	Kermit D. Vincent	
	Contributions:	$ 1,448.00
	Expenditures:	$ 1,088.00

Stip. at ¶ 29.

III. CONCLUSIONS OF LAW

The Court has jurisdiction to entertain this matter pursuant to 42 U.S.C. § 1983. Venue is proper in the United States District Court for the District of New Mexico. Although the mayoral election in question has taken place, the constitutional issues in this case are capable of repetition yet may evade review unless the Court makes a determination on the constitutionality of Article XIII, Section 4(d)(2) of the City Charter.

Plaintiff challenges the City Charter's limit on campaign expenditures as unconstitutional under the First Amendment. *Buckley v. Valeo* is the "seminal case governing the constitutional review of campaign finance reform efforts, including expenditure limitations." *Landell v. Vermont Pub. Interest Research Group,* 300 F.3d 129, 141-42 (2d Cir.2002) (citing 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659). In *Buckley,* the Supreme Court held that expenditure limitations "impose direct and substantial restraints on the quantity of political speech" and "limit political expression 'at the core of our electoral process and of the First Amendment freedoms.'" 424 U.S. 1, 39, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (citations omitted). Accordingly, the Court held that the constitutionality of an expenditure limitation "turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Id.* at 44-45, 96 S.Ct. 612. The limitation thus "must be narrowly tailored to serve a sufficiently strong government interest. Expenditure limitations, being more severe [than contribution limitations], require 'closer scrutiny,' and, relatively speaking, the government interest must meet a more demanding test." *Landell,* 300 F.3d 129, 141-42 (citing

Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm., 533 U.S. 431, 472, 121 S.Ct. 2351, 150 L.Ed.2d 461 (2001)). Applying this standard, the Supreme Court in *Buckley* held that while the governmental interests in preventing corruption and the appearance of corruption were compelling enough to justify restrictions on campaign contributions, such interests were inadequate to justify restrictions on individual expenditures. *See Buckley,* 424 U.S. at 45-48, 96 S.Ct. 612.

In the Preliminary Injunction Memorandum Opinion denying Mr. Homans a preliminary injunction, this Court stated that "[s]ince the announcement of *Buckley* twenty-five years ago, the Supreme Court has been divided as to *Buckley's* scope. Particularly, there is substantial disagreement amongst the Justices as to whether the ruling in *Buckley* provides a *per se* ban on all expenditure caps." *Homans v. City of Albuquerque,* 160 F.Supp.2d 1266, 1270-71 (D.N.M.2001). As a result of the "abundance of judicial commentary on compelling governmental interests which fall outside the ambit of *Buckley,*" this Court was convinced to read *Buckley's* holding narrowly, and was "persuaded that the holding of *Buckley v. Valeo* does not render Albuquerque's expenditure limits *per se* unconstitutional." *Id.* at 1272. The Court went on to find that the City had demonstrated evidence of two compelling governmental interests, namely preserving the public faith in democracy and reducing the appearance of corruption, and that the City Charter's expenditure limits were narrowly tailored to meet these compelling governmental interests. *Id.* at 1272-73.

Citing the same case law regarding the scope of *Buckley's* holding in light of the post-*Buckley* experience as this Court did in the Preliminary Injunction Memorandum

Opinion, the Second Circuit Court of Appeals in *Landell* similarly rejected the contention that *Buckley* established an absolute ban on expenditure limitations. The Second Circuit stated,

> Critically, the Court [in *Buckley*] never concluded that the Constitution would always prohibit expenditure limits, regardless of the reasons and the record supporting the limitations. It simply held that based on the record before it, "[n]o governmental interest that has been suggested is sufficient to justify" the federal expenditure limits. After *Buckley,* there remains the possibility that a legislature could identify a sufficiently strong interest, and develop a supporting record, such that some expenditure limits could survive constitutional review.

Landell, 300 F.3d 129, 142-43 (citations omitted). Further, the Second Circuit noted that "an unyielding interpretation of *Buckley* that expenditure limits are *per se* unconstitutional . . . would require us to ignore not only *Buckley's* own language, but also over three decades of experience as to how the campaign funds race has affected public confidence and representative democracy." *Id.* at 144-45.

As this Court did in the Preliminary Injunction Memorandum Opinion, the Second Circuit next addressed the question of whether the expenditure limitations at issue were narrowly tailored to a sufficiently important governmental interest. The Second Circuit found as follows:

> Fundamentally, Vermont has shown that, without expenditure limits, its elected officials have been forced to provide privileged access to contributors *in exchange for* campaign money. Vermont's interest in ending this state of affairs is compelling: the basic democratic requirements of

> accessibility, and thus accountability, are imperiled when the time of public officials is dominated by those who pay for such access with campaign contributions.

Id.[2] The Second Circuit then upheld the district court's determination that the limits set by Vermont permitted fully effective campaigns and were narrowly tailored. *See Id.* at 155. After thus reviewing Vermont's expenditure limitations "with the level of exacting scrutiny required by *Buckley* and its progeny for expenditure limits," the Second Circuit held these provisions to be constitutional. *Id.*

Unlike the Second Circuit, however, the Tenth Circuit has expressed its disagreement with this Court's interpretation of *Buckley.* In its decision granting Mr. Homans a preliminary injunction, the Tenth Circuit cited *Buckley* as providing a "clear statement" that campaign expenditure limitations "do not survive *even under* the rationale of (1) deterring corruption and preventing evasion of contribution limits, (2) equalizing the financial resources of the candidates, and (3) restraining the cost of election campaigns for its own sake." *Homans v. City of Albuquerque,* 264 F.3d 1240, 1243-44 (10th Cir.2001) (emphasis added). Upon its own "independent examination of the record," the

---

[2] In the context of its discussion regarding Vermont's compelling interest in expenditure limitations, the Second Circuit addressed the problem of bundling – a "distortion of the democratic process" which is caused when contributors "are members of organized, wealthy interest groups that 'bundle gifts.'" *Landell,* at 150-51. The Second Circuit cited to the finding regarding the bundling phenomenon in this Court's Preliminary Injunction Memorandum Opinion, and concluded that this phenomenon was "not anticipated by the Supreme Court in *Buckley.*" *Id.*

Tenth Circuit held that, even if the "facts do matter, . . . the compelling governmental interests identified by the district court, under the broad headings of preserving faith in democracy and deterring the appearance of corruption, are really no different than the interests deemed insufficient to justify expenditure limitations in *Buckley*." *Id.* at 1244. The Tenth Circuit explicitly rejected this Court's reading of post-*Buckley* case law as evidencing a division within the Supreme Court over *Buckley's* scope. The Tenth Circuit stated that the cases this Court relied upon "all involve limitations on contributions, and even then, the statements are not those of a majority even if joined by other members of the Court," and that "the Supreme Court has not suggested that the distinction between campaign expenditures and campaign contributions is about to change." *Id.* Finally, the Tenth Circuit noted that its decision to grant Mr. Homans a preliminary injunction was "following binding Supreme Court precedent and protecting the core First Amendment right of political expression." *Id.*

This Court is mindful that the decision of an appellate court on an emergency motion for an injunction pending appeal does not constitute a binding decision that plaintiff is entitled to permanent injunctive relief. *See American Civil Liberties Union of N.J. v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1476-77 (3d Cir.1996) (en banc). Nonetheless, as a district court within the Tenth Circuit, this Court is bound to follow the Tenth Circuit's interpretation of the law, and its application of the law to the facts. As discussed above, the Tenth Circuit made its own independent examination of the record, which is now again before this Court, and found that the interests the City's expenditure limitations were enacted to protect are

insufficient to survive a First Amendment challenge. Thus, under the Tenth Circuit's interpretation of *Buckley* and its application of *Buckley* to the instant facts, this Court is constrained to find that the expenditure limitations in the City Charter constitute an unconstitutional infringement of the First Amendment. Until the Supreme Court revisits the issue of campaign finance reform, thereby resolving the clear conflict that now exists between the Tenth Circuit and the Second Circuit, this Court can reach no other holding. This Court is persuaded that, under the interpretation of *Buckley* applied in the Preliminary Injunction Memorandum Opinion and in the Second Circuit's *Landell* decision, the expenditure limitations in the City Charter would survive a constitutional challenge, as the City has demonstrated that these expenditure limitations are narrowly tailored to serve the compelling interests of deterring corruption and the appearance of corruption, promoting public confidence in government, permitting candidates and officeholders to spend less time fundraising and more time performing their duties as representatives and interacting with voters, increasing voter interest in and connection to the electoral system, and promoting an open and robust public debate by encouraging electoral competition.

IV. RELIEF

IT IS THEREFORE ORDERED that the parties' Joint Motion for Stipulated Admission of Evidence, Briefing Schedule and Expedited Determination on the Merits **[Doc. No. 35]** is **GRANTED.**

IT IS THEREFORE FURTHER ORDERED that Mr. Homans is entitled to (1) a declaratory judgment that

Article XIII, Section 4(d)(2) of the City Charter violates the First Amendment to the United States Constitution; and (2) a permanent injunction enjoining the City and the City Clerk from enforcement of the expenditure limitations under Article XIII, Section 4(d)(2) of the City Charter.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SANDER RUE,

Plaintiff,

v. Civ. No. 01-1036 JP/LFG

CITY OF ALBUQUERQUE,
a Municipal Corporation,
MARGIE BACA ARCHULETA,
in her capacity as Clerk of the
City of Albuquerque, and
THE CITY OF ALBUQUERQUE
BOARD OF ETHICS AND
CAMPAIGN PRACTICES,
a board of the City of Albuquerque,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed October 11, 2002)

On September 10, 2002, in its final supplemental briefing on Plaintiff's Motion for Summary Judgment (Doc. No. 40), the City of Albuquerque (City) responded to the Court's request to explain how this case "is factually distinguishable in a manner that would permit a result different from that reached by Judge Vázquez" in *Homans v. City of Albuquerque, et al.*, Civ. No. 01-917 MV/RLP. In its response the City did not attempt to factually distinguish this case from *Homans*, which held that the City's campaign expenditure limit for a mayoral candidate was unconstitutional. Civ. No. 01-917 MV/RLP, Doc. No. 48. Instead, the City argued that neither Judge Vázquez's judgment nor the Tenth Circuit's order in *Homans* is binding here.

According to the City, Judge Vázquez incorrectly assumed "that the Tenth Circuit's injunction order requires entry of judgment for Plaintiff." September 10, 2002, Letter Brief from Randy M. Autio, Deputy City Attorney at 3 (Letter Brief). The City is certainly correct that in an ordinary case a district court is not bound by an appellate court's decision on preliminary relief since an appellate "decision on a preliminary injunction is, in effect, only a prediction about the merits of the case" *U.S. v. Local 560 (I.B.T.)*, 974 F.2d 315, 330 (3d Cir. 1992). In *Homans*, however, the Tenth Circuit's "prediction" about the outcome of the case was not based at all on the facts, but rather on what that Court declared was a "legal error concerning the First Amendment." *Homans v. City of Albuquerque, et al.*, 264 F.3d 1240, 1243 (10th Cir. 2001). The Tenth Circuit brushed aside the City's argument that "the facts do matter," and held that the "compelling governmental interest identified by the district court, under the broad headings of preserving faith in democracy and deterring the appearance of corruption, are really no different than the interests deemed insufficient to justify expenditure limitations in *Buckley v. Valeo*, 424 U.S. 1 (1976)," 264 F.3d at 1244 (full citation inserted). The Tenth Circuit's order in *Homans* repudiated the governmental interest asserted in that case, which are the same interests the City has asserted here.

Nonetheless, the City has argued that its compelling governmental interests "in freeing officeholders from the pressures of endless fundraising so as to preserve their time for performing their duties as representatives" was not addressed in *Buckley* or the Tenth Circuit's order in *Homans*. Letter Brief at 3. In its Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, the City

argued that the Tenth Circuit's order in *Homans* identified "only two compelling interests supporting spending limits, namely, 'preserving faith in democracy and deterring the appearance of corruption.'" Doc. No.49 at 47. However, the appellate order in *Homans* went much farther than the City admits.

As Judge Vázquez observed in her Findings of Fact and Conclusions of Law, "the Tenth Circuit made its own independent examination of the record . . . and found that the interest the City's expenditure limitations were enacted to protect are insufficient to survive a First Amendment challenge." Civ. No. 01-917 MV/RLP, Doc. No. 46 at 17. The Tenth Circuit's examination of the record in *Homans* necessarily revealed that the City enacted campaign expenditure limitations in part to permit candidates and officeholders to spend less time fundraising and more time interacting with voters and performing official duties. This interest was characterized in both the City's briefing, Civ. No. 01-917 MV/RLP, Doc. No. 13 at 9 & 15, and in Judge Vázquez' Memorandum Opinion and Order, Civ. No. 01-917 MV/RLP, Doc. No. 21 at 8, 10 & 12, as a governmental interest that was present in *Homans*, which *Buckley* did not address. Judge Vázquez' Memorandum Opinion and Order specifically stated that preserving the public's faith in democracy and reducing the appearance of corruption were enhanced by campaign expenditure limits because without spending limits "candidates are [] forced to spend innumerable hours eliciting contributions rather than performing public duties and ascertaining the interests of those citizens unable to make large financial contributions to their campaigns." Civ. No. 01-917 MV/RLP, Doc. No. 21 at 12. Hence, the City's interest in freeing officeholders from the pressures of endless fundraising was

addressed by the Tenth Circuit in *Homans* as one of the "compelling governmental interests identified by the district court[] under the broad headings of preserving the faith in democracy and deterring the appearance of corruption." 264 F.3d at 1244.[1]

Here, Plaintiff has challenged the campaign expenditure limit for a City Councillor candidate, which is based on the same formula as a candidate for mayor.[2] After full review of the relevant facts and law Judge Vázquez held that the City's campaign expenditure limit for a mayoral candidate violated the First Amendment to the United States Constitution. Judge Vázquez observed that "under the Tenth Circuit's interpretation of *Buckley* and its application of *Buckley* to the instant facts, this Court is constrained to find that the expenditure limitations in the City Charter constitute an unconstitutional infringement of the First Amendment." Civ. No. 01-917 MV/RLP, Doc. No. 21 at 17. The City has not factually distinguished this case from *Homans* or offered a persuasive legal rationale for deviating from Judge Vázquez' judgment. Accordingly, under the Tenth Circuit's interpretation of the law in *Homans*, the governmental interests asserted here by the

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[1] Another aspect of the appellate order in *Homans* counsels against the City's view that this interest went unaddressed. The Tenth Circuit's order summarily rejected the concurring analysis of Judge Cohn in *Kruse v. City of Cincinnati*, 142 F.3d 907, 919-920 (6th Cir. 1998). Judge Cohn had opined that the "independent interest in freeing officeholders from the pressures of fundraising so they can perform their duties" survived *Buckley*.

[2] A candidate for either the office of mayor or city councillor is prohibited by Article XIII, Section 4(d) of Albuquerque's City Charter from making campaign expenditures greater than "twice the amount of the annual salary paid by the City of Albuquerque" for the office "as of the date of filing of the Declaration of Candidacy."

City of Albuquerque in support of its campaign expenditure limitation for a City Councillor candidate do not overcome *Buckley*'s holding that campaign expenditure limitations violate the First Amendment to the United States Constitution.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment (Doc. No. 40) is GRANTED, and Plaintiff is entitled to the following relief:

(1) a declaratory judgment that Article XIII, Section 4(d)(1) of the Albuquerque City Charter violates the First Amendment of the United States Constitution; and

(2) a permanent injunction enjoining the City of Albuquerque from enforcing the expenditure limitation under Article XIII, Section 4(d)(1) of the Albuquerque City Charter.

/s/ James A. Parker
CHIEF UNITED
STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RICK HOMANS, Plaintiff-Appellee, v. THE CITY OF ALBUQUERQUE, a municipal corporation; FRANCIE D. CORDOVA, in her capacity as Clerk of the City of Albuquerque, Defendants-Appellants.	No. 02-2244 (D.C. No. CIV-01-917 MV/RLP)
SANDER RUE, Plaintiff-Appellee, v. THE CITY OF ALBUQUERQUE, a municipal corporation; FRANCIE D. CORDOVA, in her capacity as Clerk of the City of Albuquerque; THE CITY OF ALBUQUERQUE BOARD OF ETHICS AND CAMPAIGN PRACTICES, a board of the City of Albuquerque, Defendants-Appellants.	No. 02-2316 (D.C. No. CIV-01-1036 JP/LFG)

ORDER

Filed May 25, 2004

Before **LUCERO, O'BRIEN**, and **TYMKOVICH**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk
of Court

by: /s/ J. Leal
Deputy Clerk

CHARTER OF THE
CITY OF ALBUQUERQUE

ARTICLE XIII. ELECTION CODE

Section 4. CAMPAIGN FINANCING.

* * *

(d) Limits to Campaign Financing. No candidate shall allow or accept contributions or make expenditures in excess of the following for any election:

1. To a candidate for the office of Councillor, contributions or expenditures equal to twice the amount of the annual salary paid by the City of Albuquerque to Councillors as of the date of filing of the Declaration of Candidacy.

2. To a candidate for the office of Mayor, contributions or expenditures equal to twice the amount of the annual salary paid by the City of Albuquerque to the Mayor as of the date of filing of the Declaration of Candidacy.

(e) Limits to Contributions. No candidate shall, for any one election, allow total contributions from any one person with the exception of contributions from the candidate himself or herself of more than 5% of the annual salary for such office at the time of filing the Declaration of Candidacy.

NO. 04-413

Supreme Court, U.S.
FILED
OCT 25 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

CITY OF ALBUQUERQUE,
A MUNICIPAL CORPORATION, *et al.*,

Petitioners,

v.

RICK HOMANS; SANDER RUE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

James Bopp, Jr.
Counsel of Record
Eric C. Bohnet
JAMES MADISON CENTER
FOR FREE SPEECH
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807
(812) 232-2434

Paul M. Kienzle, III
SCOTT & KIENZLE, P.C.
Post Office Box 587
Albuquerque, NM 87103
(505) 246-8600

Henry M. Bohnhoff
RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.
Post Office Box 1888
Albuquerque, NM 87102
(505) 765-5900

Counsel for Respondent Sander Rue

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

Question Presented

I. Whether campaign spending limits imposed by the City of Albuquerque violate the First Amendment.

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Statement of the Case

Petitioners in these cases seek to re-open a long settled issue: whether candidate spending limits violate free speech and association rights under the First Amendment. For most of the twenty-eight years that have passed since this Court struck down similar limits on federal candidates in *Buckley v. Valeo*, 424 U.S. 1 (1976), Albuquerque has been the only American jurisdiction to enforce such limits.

I. Proceedings Below

Rue does not dispute Petitioner's account of the proceedings below. However, it is important to note that both the records and the procedural posture of these two cases differ substantially. They were not consolidated at any point in prior proceedings, and in the district court were even decided by different judges. In *Homans*, the district court ruled against spending limits following a bench trial that consisted largely of the submission of affidavits and expert reports by the City. Since the Plaintiff did not cross examine these experts or submit his own expert reports, the record in that case is rather one-sided. In contrast, *Rue* was decided on a summary judgment record that included the cross-examination of most of these experts in depositions, as well as analysis by the Plaintiff's own experts that filled in some of the gaps left by the City's evidence.

While these differences are immaterial to the Tenth Circuit's principal holding that campaign spending limits simply cannot survive appropriate scrutiny, they could become important under a more fact intensive analysis such as that employed by Judge Lucero in his concurrence below. Indeed, the very different factual conclusions drawn by Judge Lucero and his colleagues in the Tenth Circuit decision and by the district court opinion of Judge Vazquez in the *Homans* case can be almost entirely explained by the different records compiled in the two cases as many of the factual findings made by Judge Vazquez were revealed by the *Rue* record to be based upon misleading, incorrect, or inapplicable information.[1]

For example, the *Homans* district court errantly found that Albuquerque's turnout was higher than the average. *Homans v. City of Albuquerque*, 217 F. Supp. 2d 1197, 1201 (D.N.M. 2002). The City originally submitted similar data in *Rue*, App. 0441-0442[2] (Gierzynski dep.), but this data ultimately turned out to be badly flawed because it compared Albuquerque's turnout as a percentage of registered voters to a national average based upon voting age population. App. 0209-0210 (Coleman supp. decl.). Like other statistics compiled by the City's experts, this statistic also excluded most council-only elections while including mayoral

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1 There was also some evidence submitted by the City in *Homans* but not in *Rue*. Most notably, then-Mayor Jim Baca's testimony was not submitted at any point in the *Rue* litigation.

2 All citations to the appellate record in this brief are to the *Rue* record.

recounts with few or no council candidates on the ballot. See App. 0208, 0211 (Coleman supp. decl.).

Similarly, findings made by the *Homans* district court regarding comparisons of contributions in Cincinnati and Albuquerque turned out to be inapplicable to the council races at issue here. *See Homans*, 217 F. Supp. 2d at 1201. While the City did submit a report that claimed contributors of $1,000 or more had contributed 53% of Cincinnati funds but only 27% of Albuquerque campaign funds, App. 0621 (Makinson report), these differences were largely explained by differences in contribution limits and donor bases in the two cities. For example, Albuquerque's contribution limits prohibited contributions of that size entirely from its council candidates, and also capped contributions at approximately $4,000 in mayoral races. App. 0313, 0317-0318 (Makinson dep.). In contrast, Cincinnati's lack of any contribution limits at that time enabled donors to make "about a hundred contributions" over $4,000, including fifty contributions of $10,000 or more. App. 0313 (Makinson dep.). These $10,000+ contributors alone contributed a minimum of $500,000 to Cincinnati campaigns–more than triple what Albuquerque's entire city council was allowed to spend. The statistics also reflected Cincinnati's larger base of big campaign donors as the report's author conceded that donors in Cincinnati had also made more large contributions in federal campaigns than had their Albuquerque counterparts. App. 0314-0315 (Makinson dep.).

Finally, the *Homans* court errantly found that candidates subject to spending limits spend more money on actual vote contact. *Id.* at 1201. While there was evidence that they spend a higher percentage, Albuquerque council candidates actually spent far less on voter contact than their counterparts elsewhere. For example, the City's expert, Dr. Anthony Gierzynski claimed that candidates in comparably sized California cities spent only 50% on voter contact compared with 75% in Albuquerque, App. 0448-0449, 0458 (Gierzynski rep.), but he also found that those California candidates spent $8.46 per vote while Albuquerque candidates spent only $2.12 in council elections. App. 0445 (Gierzynski rep.) Applying Dr. Gierzynski's voter contact percentages reveals that California candidates spent $4.23 on voter contact while Albuquerque council candidates spent only $1.59 per vote - less than half of what their California counterparts spent contacting voters.

II. Factual Background

Article XII, Section 4(d)(1) of the City of Albuquerque Charter prohibits candidates for city council from accepting contributions or making expenditures equal to twice the amount of the annual salary paid by the City of Albuquerque to Councillors as of the date of filing of the Declaration of Candidacy. During the most recent election, held October 2, 2001, spending was thereby limited to $17,056, and the average council district contained 26,128 registered voters. App. 0431 (2001 Certificate of Canvass). As a qualified candidate for District 5 Councilor of the City of Albuquerque, Rue spent a total of $25,724.17. App.

0168-0169 (Rue aff.). Had Rue not been protected by a preliminary injunction, he would have had to forego at least three direct mailings, thereby preventing him from effectively advocating his message to many prospective constituents. App. 0013-0015 (Verified Complaint).

As a result of this limit, candidates for the Albuquerque city council spend far less than candidates for city councils in comparable cities, App. 0445 (Gierzynski rep.) or for seats in the New Mexico legislature that represent fewer people than Albuquerque councillors. App. 0221-0222 (McCleskey rep.); App. 0275-0276 (Mayer dep.).

Because they are permitted to spend so little, most city council candidates make little or no effort to communicate with most potential voters and instead focus their efforts on those who are regarded as most likely to vote. E.g. App. 0221 (McCleskey rep.); App. 0378, (Feldman dep.); App. 0369 (Reed dep.). Counsel candidates therefore typically send direct mail to only 2,000-8,000 households while state senate candidates running in smaller districts without limits typically mail to 12,000-15,000, and state house candidates running in much smaller districts mail to 6,000-10,000. App. 0222 (McCleskey rep.). Legislative candidates in Albuquerque have also been able to communicate through mediums such as radio and billboards that have been effectively prohibited to city council candidates. App. 0221 (McCleskey rep.).

This limit was imposed in 1974 after being approved by the voters as part of a new charter that gave Albuquerque home rule status and transformed its government from a commission-manager system with commissioners elected at large to a council-mayor system in which councillors were selected by districts. App. 0744-0745 (Cottrell dep.).

Although Albuquerque has been the only major American city to impose spending limits on council candidates during the past quarter century, the record in this case failed to identify any substantial benefit that has been caused by spending limits. Voter turnout in council races has been poor, averaging only 17% of voting age population (VAP) voting in council races held concurrent with a mayoral election, and only 13% when there is no mayoral race on the ballot. App. 0209-0211 (Coleman supp. dec.). Turnout in mayoral races has been somewhat higher, but still towards the lower end of the range of turnout experienced by cities across the country. 0208-0212 (Coleman supp. dec.).

Competition in Albuquerque council races has been similar to that experienced nationally, with various compilations of Albuquerque's incumbent retention rate being calculated at 72.7%-94.5% compared with national data ranging from 81.8%-86.1% depending upon the years and cities included in the data set, and the methodology used to calculate re-election rates. See App. 0183-0184 (Coleman rep.), App. 0205-0208 (Coleman supp. dec.), App. 0820-0821(Gierzynski rebuttal report).

Although the City provided a number of anecdotes, polling data, and newspaper articles to support its various theories of justification, none of these showed Albuquerque to be significantly better than other U.S. cities that have not had spending limits.

Argument

The Tenth Circuit in this case struck down the candidate spending limits imposed by the City of Albuquerque for two basic reasons: (1) as explained by Judge Tymkovich for the majority, "all three of the asserted interests are thus constitutionally incapable of justifying spending restrictions as a matter of law;" *Homans v. City of Albuquerque*, 366 F.3d 900, 914-15 (10th Cir. 2004); and (2) even if the asserted interests could theoretically justify a spending limit, "Albuquerque's evidence, even when viewed in the light most favorable to the City, fails to establish that its candidate-expenditure limits are necessary to serve a compelling state interest." *Id.* at 913. Hence Judge Lucero, who largely agreed with the City's legal theories and therefore did not join Judge Tymkovich's opinion, nonetheless held the limits to be unconstitutional due to the inadequacy of the City's record. *Id.* Since both of his colleagues joined Judge Lucero's factual analysis, this aspect of his opinion is therefore an alternative holding of the panel.

This decision is therefore a poor candidate for this Court's review not only because of its consistency with well established precedence from this Court and others, but also because the City has failed to meet its factual burden even under its own legal theories.

Although a panel of the Second Circuit has recently expressed its disagreement with Judge Tymkovich's majority analysis in this case, *See Landell v. Sorrell*, 382 F.3d 91, 2002 U.S. App. LEXIS 28171 (2nd Cir. Aug. 7, 2004); there is little difference between the legal analysis applied in that case and that employed by Judge Lucero. That the Second Circuit panel found that Vermont had proven that its spending limits served compelling interests while the Tenth Circuit per Judge Lucero's opinion found that Albuquerque's did not is attributable to differences in the records between the two cases. Because both Judge Tymkovich and Judge O'Brien joined Judge Lucero's factual analysis as well as Judge Tymkovich's legal analysis, their decision should be affirmed even under the legal theories proffered by the City and espoused by Judge Lucero and the Second Circuit.

I. The Unconstitutionality of Campaign Spending Limits Is Well Established.

The Tenth Circuit decision in this case follows the unwavering precedence of this Court. For nearly thirty years, this Court has consistently regarded campaign spending limits as unconstitutional restraints on free speech. As it recently described its approach to the subject, "we have routinely struck down limitations on independent expenditures *by candidates*, other individuals, and groups . . ." *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 441 (2001) ("Colorado II")(emphasis added). This "routine" began with the landmark case of *Buckley*, 424 U.S. 1 (1976), in which this Court applied strict judicial scrutiny and held that limits on spending impose constitutionally

impermissible restraints on speech and association that are not justified by any compelling state interest. *Id.* at 54-58. Accordingly, this Court struck down limits on candidate campaign expenditures, on independent expenditures by non-candidates, and on candidate expenditures from personal funds. *Id.* at 58. Since *Buckley*, this Court has also struck down restraints on spending imposed on political action committees, *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985), political parties, *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("Colorado I"), nonprofit corporations, *FEC v. Massachusetts Citizens for Life, Inc.* 479 U.S. 238 (1986) ("MCFL"), and business corporations. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).[3] Beginning with its initial review of spending restraints, the Supreme Court has utilized universal language to broadly condemn spending limits, "the First Amendment simply cannot tolerate [the] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy" whether the money is his own funds or legal contributions. *Buckley*, 424 U.S. at 54. It did not evaluate the evidentiary support for the interests presented as justifications for the spending limit, but simply found

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[3] Some restrictions on corporate and union expenditures have since been upheld as restrictions on the organizational form that protected the rights of dissenting shareholders and union members. Critical to the constitutionality of such restrictions has been this Court's finding that these restrictions, unlike other spending limits, they did not directly restrain speech because "[t]he ability to form and administer separate segregated funds . . . has provided corporations and unions with a constitutionally sufficient opportunity" to make the desired communications. *McConnell v. FEC*, 124 S. Ct. 619, 694 (2003).

that "[n]o governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression." *Id.* at 55.

No Supreme Court Justice since *Buckley* has ever described the Court's approach to candidate spending limits as anything but absolute, and even those Justices who have expressed sympathy for some spending limits have nonetheless acknowledged that upholding such limits would require a change from the current state of the law. *See Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 405 (2000)(Breyer, J., concurring)(arguing that the Court should find a way "to reinterpret aspects of Buckley in light of the post-Buckley experience . . . particularly in respect to independently wealthy candidates, whose expenditures might be considered contributions to their own campaigns.").

Following this Court's clear lead, lower court decisions have also repeatedly refused to uphold campaign spending limits. *See, e.g. Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998) (affirming injunction against enforcement of state spending limits on candidates for judicial office); *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998) (striking down limits on candidate spending in city council elections); *New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8 (1st Cir. 1996) (striking down state limit on independent expenditures); *Service Employees Int' Union v. Fair Political Practices Comm'*, 955 F.2d 1312, 1322 (9th Cir. 1992) (striking state ban on intra-candidate transfers as an unconstitutional limitation on expenditures); *Lincoln Club of Orange County v. City of*

Irvine, 292 F.3d 934 (9th Cir. 2002) (striking limit on contributions to independent expenditure committee).

The only existing court decision to have read *Buckley* as anything but a final decision against the constitutionality of campaign spending limits is the Second Circuit's recent decision in *Landell v. Sorrell*, 382 F.3d 91, 2002 U.S. App. LEXIS 28171; in which it found that Vermont's candidate spending limits served compelling interests in "preventing the reality and appearance of corruption, and protecting the time of candidates and elected officials," and remanded to the district court for determination of whether the limits were narrowly tailored. *Id.* at 87, 122-125. Judge Winters dissented from this portion of the decision, eloquently explaining in a lengthy dissent how the panel decision misread this Court's decision in *Buckley*. *Id.* at 170-346 (Winters, J., dissenting). A petition for rehearing and rehearing en banc is pending in that case.

II. This Court has Already Rejected Each of the City's Alleged Justifications for Campaign Spending Limits.

Each of the interests proffered by the City as justification for its spending limit must fail both under the weight of precedent and upon the force and logic of the strict scrutiny standard. Two such interests are suggested: (1) "Deterring the reality and appearance of corruption" Cert. Petition at 17; and (2) Preserving the time of officeholders and candidates." Id. at 21. Each has been addressed and rejected by this Court.

The anti-corruption rationale was explicitly rejected by this Court in *Buckley*. Although it noted candidate dependence on large campaign contributions was "the major evil associated with rapidly increasing campaign expenditures," it rejected the "interest in alleviating the corrupting influence of large contributions" as a support for spending limits because it was "served by the Act's contribution limitations and disclosure provisions rather than by . . . campaign expenditure ceilings." *Buckley*, 424 U.S. at 55. Far from ignoring the potential for an interest group "bundling" together numerous contributions, the Court actually pointed to the potential for "substantial contributions to candidates by some major special-interest groups through the combined effect of individual contributions from adherents" as an important palliative for the threat to speech and association rights posed by contribution limits. *Id.* at 28 n. 31.

While the time-saving argument was not rejected in quite as explicit a fashion as was the anti-corruption justification, it was rejected nonetheless. As Judge Winters, who as an attorney argued *Buckley v. Valeo* to this Court, has explained, "the arguments regarding the time politicians spend fundraising were . . . known and made before the Supreme Court in Buckley." *Landell*, at 277 (Winters J., dissenting). Specifically, "The time-protection argument was relied upon by the Court of Appeals in Buckley in upholding the statute . . . and was mentioned by the Supreme Court itself" besides figuring prominently in several briefs submitted in that case, including that of the Attorney General and Solicitor General. *Id.* at 278.

Moreover, this justification amounts to little more than a claim that the government must intervene to stop candidates from engaging in too much of the wrong kind of speech. The only way that spending limits can prevent an official from neglecting his duties is by prohibiting the official from making communications that the official considers to be so important that he is willing to neglect his duties in order to make them. If a government can limit how much a candidate spends to mail his message to constituents' homes, why could it not also (or instead) limit the total amount of time he spends campaigning each day?

Indeed, such a rule would be more closely tailored to the asserted interests because extra funds can actually save candidate time by allowing the hiring of paid staff to perform tasks that the candidates would otherwise need to do themselves. As Councillor Sally Mayer pointed out, "with the spending cap in place, it limits what you can do. You can't afford to really hire someone to help you do fund raising." App. 0267 (Mayer dep.). The City's own expert also explained that candidates in other jurisdictions frequently hire campaign managers because "a candidate might be so busy that they want someone else to handle a lot of the aspects of the campaign that the candidate might have to handle." App. 0333-0334 (Gierzynski dep.). Of course, there are also numerous alternative means of increasing the amount of time officeholders have available. The City could increase its contribution limits to allow candidates to raise more money from their existing donors. It could make the council a full-time position so that its member would not need to

maintain outside employment, increase the number of councillors to reduce the burden on each individual, or provide additional staff to allow them to attend to their official duties more efficiently. Unlike campaign spending limits, none of these alternative remedies would harm First Amendment rights, and some would even enhance them.

This Court has wisely rejected a variation of this proffered justification because "[t]he First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." *Buckley*, 424 U.S. at 57. Rather, it has properly demanded that it is the "people individually as citizens and candidates . . . who must retain control over the quantity and range of debate on public issues in a political campaign." *Buckley*, 424 U.S. at 57. Restricting the speech of candidates is especially troublesome because "[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Republican Party of Minnesota*, 536 U.S. 765, 781-782 (2002). It does not matter whether political campaigns spend too much from a public policy standpoint or whether the type and quantity of communications are optimal for advancing some governmental objective. Candidates and their supporters are not government policy engines but private citizens with First Amendment rights.

III. The Facts Do Not Support The City's Legal Theories.

Even if *Buckley*'s spending limits decision could be read as requiring a case-by-case factual review rather than the outright proscription followed by the Tenth and Sixth Circuits, the facts required to justify such a limit would at least need to exceed those available to this Court in *Buckley*. But such a record is not to be found in this case. Rather, as Judge Lucero explained for the panel below, "the Buckley evidence was of a far greater magnitude than that presented here and smelled of actual quid pro quo." *Homans*, 366 F.3d at 911. Similarly, "Albuquerque's evidence, even when viewed in the light most favorable to the City, fails to demonstrate that expenditure limits are necessary to further a compelling state interest in preserving officeholders' time." *Id.* at 913.

The paucity of the City's factual case also makes the result in this case fully consistent with the opinion issued by a panel of the Second Circuit in *Landell*, 382 F.3d 91, 2002 U.S. App. LEXIS 28171.[4] In that case, the panel found that "Vermont presented powerful evidence concerning the time pressures which the prospect of unlimited expenditures places on candidates for office" *Id.* at 79. Even so, the panel stopped far short of declaring Vermont's limits constitutional and instead remanded to the district

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[4] A petition for re-hearing or re-hearing en banc was filed in the *Landell* case on September 1, 2004. Hence, the panel's analytical departures from the decisions of the Tenth and Sixth Circuits may yet be resolved by the Second Circuit without need for action by this Court.

court for determination of the critical narrow tailoring issue. *Id.* at 122-125. It has ordered the district court to consider not only whether the *type* of limit is the least restrictive means to achieve the state's objectives, but also whether the limits are lower than necessary. *Id.* Hence, it is entirely possible and even likely that the Vermont spending limits will ultimately be struck down either in the district court or by the Second Circuit on an appeal from the remand. Indeed, the Second Circuit's analysis shows that the limit here would need to clear an additional hurdle beyond those that doomed it in the Tenth Circuit - whether they are lower than necessary.

Nor does the record in this case suggest a need to reverse the basic holding of *Buckley* against spending limits. Indeed, it affirms the wisdom of this Court in determining that there was no compelling interest served sufficiently by spending limits that could justify their harm to First Amendment rights. Because of Albuquerque's unique history of running campaigns under spending limits for a quarter century, any sizable benefit from spending limits should by now be readily apparent. If spending limits were the powerful and necessary antidote to corrupt politicians, unfair elections, disillusioned voters, and overworked officials that the City claims, their fruits ought to be readily apparent by now. If unlimited campaign spending is the disease that ails the American political system, Albuquerque's city elections and politics should stand out as objectively and demonstrably better than the numerous comparable systems that have not been subject to spending limits. Instead, the evidence suggests that Albuquerque's politics and

elections are typical at best, with no substantial benefit shown to result from limiting the campaign spending of city council candidates.

Indeed, most of the City's evidence is not about Albuquerque at all, or even about other cities. Instead, the City seeks to re-litigate *Buckley* by asserting a supposed need for spending limits in Presidential and congressional races at the federal level. Cert. Petition at 17-18. But this case is about municipal spending limits on city councillors, not federal limits on congressmen. If Congress decides that a renewed effort to enact spending limits would be constitutional, it can enact such limits and an ensuing challenge would be the proper forum for this Court to evaluate the need for such limits at the federal level.

Here, the obvious comparison for evaluating the impact of the Albuquerque limits would be the experiences of similar cities, but the City alludes to such evidence in only a single paragraph in its recitation of facts, Cert Petition at 4-5, and not at all in its legal arguments. As illustrated by the facts recited in the Proceedings Below and Factual Background sections of this brief, supra at 2-5, the City's conclusory descriptions of this evidence are dubious at best. The lone undisputed "fact" cited by the City is that Albuquerque mayoral elections have seen unusual success by challengers. Cert Petition at 5 n.3, *see* App. 0440 (Gierzynski rep.). However, the failure of any Albuquerque mayor to ever win re-election in over a quarter-century of spending limited campaigns actually undermines any claim that such limits enhance faith in government.

Finally, the issue of campaign spending limits is one that is well settled with little clamor for change. Although twenty-eight years have passed since this Court's decision in *Buckley*, the City is able to point to only four jurisdictions that have sought to impose spending limits during that time: the Albuquerque limits established before *Buckley*, two Ohio jurisdictions that established limits in 1995, and the Vermont limits at issue in *Landell*. Cert. Petition at 27. While other jurisdictions may have been dissuaded from enacting such limits by this Court's clear ruling in *Buckley*, it can hardly be doubted that many more jurisdictions would have risked legal challenge if there truly was a compelling governmental interest that could only be satisfied by campaign spending limits.

Conclusion

The Tenth Circuit's decision is fully consistent with longstanding and continuous precedent from this Court, as well as that of most of its sister Circuits. Moreover, the underlying facts would not support a reversal of its decision even under the standard adopted by a panel of the Second Circuit in *Landell*, 382 F.3d 91, U.S. App. LEXIS 28171, which is the only existing decision ever to read this Court's holding in *Buckley v. Valeo* as anything but an outright prohibition against candidate spending limits. The City's petition should therefore be denied.

Respectfully submitted,

James Bopp, Jr.,
Counsel of Record
Eric C. Bohnet
JAMES MADISON CENTER FOR
FREE SPEECH
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434

Paul M. Kienzle III
SCOTT & KIENZLE, P.C.
P.O. Box 587
Albuquerque, NM 87103-0587
(505) 246-8600

Henry M. Bohnhoff
RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.
P.O. Box 1888
Albuquerque, NM 87102
(505) 765-5900

Counsel for Respondent Sander Rue

No. 04-413

OCT 25 2004

In The

Supreme Court of the United States

THE CITY OF ALBUQUERQUE,
a municipal corporation, et al.,

Petitioners,

vs.

RICK HOMANS and SANDER RUE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT RICK HOMANS' BRIEF IN OPPOSITION

KELEHER & MCLEOD, P.A.
THOMAS C. BIRD
Counsel of Record
RICHARD L. ALVIDREZ
Post Office Box AA
Albuquerque, NM 87103
(505) 346-4646

Counsel for Respondent Rick Homans

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Did the Tenth Circuit correctly strike down the campaign spending limit imposed on Albuquerque municipal elections on the grounds that all of the interests offered by the City in defense of the limit had been considered and rejected in *Buckley v. Valeo*, 424 U.S. 1 (1976) and that the City failed to present sufficient evidence to justify the spending limit?

2. Does a split between the Tenth and Second Circuits exist, where neither court has treated *Buckley* as an absolute prohibition against campaign spending limits?

3. Should this Court consider whether preserving the time of officeholders is a compelling state interest, where the campaign spending limit imposed by the City was not narrowly tailored to serve such an interest and the City presented almost no evidence of the amount of time City officeholders spent on campaign fundraising?

4. Should the Court overturn *Buckley*?

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JURISDICTIONAL STATEMENT

Mr. Homans concurs with the Statement of Jurisdiction set out in the Petition of the City of Albuquerque (the "City"). *Pet.* at 1.

RELEVANT AUTHORITY INVOLVED

Mr. Homans concurs with the City's recitation of Constitutional Provisions and Statutes Involved, *Pet.* at 1, except that it omits the portion of the First Amendment protecting the associational rights invoked by Mr. Homans. ("Congress shall make no law . . . abridging . . . the right of the people to assemble. . . . ").

STATEMENT OF THE CASE

A. Relevant Facts

The City enacted Article XIII, Section 4(d) in 1974 as part of a comprehensive restructuring of City government. The restructuring entailed adoption of a new City charter, creating a home rule government and replacing the commissioner-manager system with a council-mayor structure. *Rue App.* at 744-45. Albuquerque voters thus approved the campaign spending and contribution limits as part of a broad reorganization of Albuquerque's City government, not as a single item referendum. *App.* at 3.

The City's Campaign spending limit was twice the mayor's salary, or $174,720, at the time of the 2001 City election. *App.* at 3, 4. Violation of the spending limit exposes a candidate to fires, removal from office, and public reprimand. *App.* at 4.

As part of his mayoral campaign effort, Mr. Homans launched a campaign of "Great Ideas for Albuquerque." *Homans App.* at 298. The Homans campaign included such proposals as eliminating the gross receipts tax on medical services to encourage healthcare providers to remain in the City; restoration of the endangered Bosque area adjacent to the Rio Grande; and a "311" telephone line to provide citizens with assistance in dealing with City departments and agencies, among other ideas. *Id.* at 298-99. In addition, Homans procured office space and hired campaign workers to assist in his campaign for mayor. *Id.* at 299. Homans' campaign for mayor was his first attempt at elected public office. *Id.* at 298. Homans' initial polling indicated that only two percent (2%) of city registered voters considered voting for him as mayor. *Id.*

In order to run a successful political campaign that allows a candidate to get his or her message out to the over 220,000 registered voters in the City, a candidate needs to maintain a sustained frequency rating for his or her campaign message with the voters. *Id.* at 302. A frequency rating is the repeated exposure of the candidate's message to the electorate. *Id.* An effective media campaign with a sufficient frequency rating to reach a substantial number of registered voters in the City requires an integrated approach to advertising that necessarily involves the use of such media as television, radio, billboards, print, internet and other media. *Id.*

The cost for a single, one-page newspaper advertisement in a city newspaper of general circulation is between $5,000 and $9,000. *Id.* The cost for a full-color advertisement can be even more. *Id.* A single billboard advertisement along one of the two interstate highways running through the City costs between $2,500 and $5,000 per

month, depending on the location and the size of the billboard. *Id.* A single direct mailing to the over 220,000 voters in the City costs between $50,000 and $80,000 for the mailer and postage. *Id.* at 303. An average quality political television commercial costs between $2,500 to $10,000 for production of the commercial alone. *Id.* Airing a commercial for a thirty-second spot during a news broadcast on a local city television station costs between $1,000 and $1,500 per showing. *Id.* An effective television campaign designed to reach the more than 220,000 registered voters in the City would need to run at least twelve (12) continuous weeks in order to maintain an adequate frequency rating with voters. *Id.* An effective television campaign costs between $40,000 to $50,000 per week. *Id.* The cost of a television campaign alone can run between $480,000 to $600,000. *Id.* The cost of this media exposure can easily exceed the $174,720 spending limit imposed by the City Charter. *Id.*

Significantly, the suspension of the campaign spending limits appeared to have no harmful effect on the 2001 mayoral election in Albuquerque, as measured by the yardsticks the City's experts employed. The City's experts pointed to Albuquerque's zero percent (0%) incumbency success rate as evidence that spending limits have improved Albuquerque's elections. *Id.* at 317. In the 2001 election, the incumbent mayor, Jim Baca, finished fourth in a field of eight candidates. *App.* at 54.

The City also argued that the absence of spending limits decreases voter turnout. The turnout for the October 2, 2001 election, however, was over 42% of registered voters. *Homans App.* at 55, 61. The average turnout for the period between 1989 and 1999 was about 35%. *Id.* A

significant increase in voter turnout thus accompanied suspension of campaign spending limits.

The City's experts also incorrectly predicted a large spending gap between incumbents and challengers. *Homans App.* at 322-324. In the 2001 election, two challengers (Mr. Chavez and Mr. Homans) raised and spent more money than the incumbent. *App.* at 55.

Mr. Homans, the biggest spender in the 2001 election, finished fifth in the mayoral race. *Id.* at 54. Mr. Schwartz did not exceed the spending limit and finished second. *Id.* at 54, 56. These simple, hard facts belie the City's anecdotes and suppositions about the effects of spending limits on electoral health in Albuquerque.

B. Procedure

Mr. Homans challenged the City's campaign spending limit in an action filed on August 1, 2001. *App.* at 4. Mr. Homans sought and obtained a temporary restraining order against enforcement of the limit. *Id.* The trial court later denied Mr. Homan's motion for a preliminary injunction, but on September 6, 2001, the Court of Appeals for the Tenth Circuit granted an injunction against the enforcement of the limit pending review of the case on the merits. *App.* at 4; *Homans v. City of Albuquerque*, 264 F.3d 1240, 1245 (10th Cir. 2001) (*per curiam*).

The district court granted Mr. Homans a permanent injunction and declaratory relief on February 13, 2002. *App.* at 4. The City appealed and the Tenth Circuit affirmed in *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004). The City unsuccessfully sought rehearing

or rehearing *en banc*. *App.* 68-69. The City petitioned this Court for a writ of certiorari on September 22, 2004.

REASONS FOR DENYING THE PETITION

The *Homans* court correctly rejected the City's justifications for the campaign spending limit because this Court considered and rejected them all (prevention of corruption or the appearance of corruption, protection of officeholder time from the burdens of fundraising, and promotion of electoral competition) 28 years ago in *Buckley v. Valeo*, 424 U.S. 1 (1976). The *Homans* court wisely declined the City's invitation to retread the interests considered in *Buckley*. In any event, all of the members of the *Homans* panel agreed that the City had failed to present evidence sufficient to sustain the spending limits under any of the justifications it advanced.

The City seeks review principally on the argument that a conflict between the Tenth and Second Circuits has arisen concerning whether *Buckley* operates as a *per se* constitutional bar to campaign spending limits. The premise underlying this argument, however, is mistaken. The *Homans* opinion repeatedly recognizes that, contrary to Mr. Homans' argument, *Buckley* was not a *per se* prohibition against campaign spending limits. The Tenth and Second Circuits agree on this point. The City's attempt to portray a split rests on a mischaracterization of the opinion below.

The Tenth and Second Circuits do differ in their views about whether protecting the time of officeholders is a compelling state interest justifying campaign spending limits. The *Homans* case offers a poor occasion for addressing this difference, however, because the City's spending

limit imposes the same restriction on incumbents and challengers and because the *Homans* record contains virtually no evidence showing how much time City officials spend raising campaign funds. The City's spending limit suffers from obvious "tailoring" defects because it does not differentiate between incumbents and challengers, or even between contributed money and a candidate's own resources.

Finally, the City has suggested no good reason for overturning *Buckley*, particularly on the record presented in defense of the City's spending limits. Principles of *stare decisis* weigh heavily against abandoning the wise balance struck in *Buckley*.

I. THE TENTH CIRCUIT CORRECTLY APPLIED THE *BUCKLEY* STRICT SCRUTINY STANDARD.

The *Homans* opinion represents a reasoned application of the strict scrutiny standard required by *Buckley*. Judge Tymkovich's opinion, joined by Judge O'Brien (the "majority opinion"), recognized that *Buckley* had already rejected the prevention of corruption as a compelling interest justifying campaign spending limits. *App.* at 32-34. The majority opinion also rejected the two "new" interests offered by the City – the state's interest in relieving officerholders from the burdens of fundraising and the promotion of electoral competition. The *Buckley* Court rejected these interests, or broader interests subsuming them.

First, the majority opinion concluded, unremarkably, that since the federal government's interest in preventing corruption did not warrant the spending limits rejected in *Buckley*, the City's spending limit could not be defended on

an anti-corruption rationale. *App.* at 32-34. "There is no basis to retreat from *Buckley's* essential teaching that campaign spending restrictions are not narrowly tailored to further the governmental interest in reducing corruption." *App.* at 34. Significantly, the majority opinion's analysis of the City's anti-corruption argument begins by acknowledging that strict scrutiny, while setting a high standard, "does not establish a '*per se*' restriction on campaign spending schemes. . . . " *App.* at 32.

Next, the majority opinion concluded that the City's purported interest in protecting officeholders (or candidates) from the strain of fundraising was subsumed within a broader interest rejected in *Buckley*, the "cost-control" rationale. *App.* at 34-37. The rejection of a broad cost-control justification for the spending limits addressed in *Buckley* made addressing each of the subordinate arguments put forth in that case unnecessary. *App.* at 36. In any event, the *Buckley* record contradicts the City's characterization of the interest in preventing officeholders or candidates from diverting time and energy to fundraising as "new." *App.* at 36. *See also Landell v. Sorell*, 382 F.3d 91, 188-189 (2d Cir. 2004) (Winter, J., dissenting) (petition for rehearing *en banc* pending) (demonstrating that the court of appeals and the Supreme Court in *Buckley* considered arguments based on the interest of protecting candidate and officeholder time).

The majority opinion also correctly determined that the *Buckley* Court considered and rejected the argument that spending limits are necessary to promote electoral competition. *App.* at 39-41. The City argued that "campaign spending poses a threat to [electoral] competition because large incumbent war chests tend to discourage serious challengers." *App.* at 39. The majority opinion,

however, recognized that the *Buckley* Court had discarded this rationale in concluding that "equalization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." *App.* at 40 (quoting *Buckley*, 424 U.S. at 56-57).

The real substance of the majority opinion in *Homans* was the recognition that the interests proferred by the City were identical to, or subsumed within, the interests addressed and rejected in *Buckley*. The majority opinion thus cautioned against efforts, like the City's arguments, to repackage rationales the *Buckley* court had already judged to be insufficient to support campaign spending limits. *See App.* at 29 (noting that "we should be careful not to credit attempts to reformulate arguments that the Supreme Court rejected long ago."); 35 (stating that Judge Lucero's approach could encourage additional attempts by governments to limit political speech by artfully restating the governmental interests rejected in *Buckley*). The majority opinion differed from Judge Lucero's analysis in concluding that *Buckley* itself precludes recognition of the reformulated interests urged by the City. *App.* at 41. Judge Lucero concluded, on the other hand, that *Buckley* did not foreclose consideration of the record the City presented, but that the City's evidence failed to show that the spending limit was necessary to further a compelling state interest. Like the majority opinion, Judge Lucero's analysis expressly acknowledged that *Buckley's* strict scrutiny standard does not create a *per se* prohibition against spending limits. *App.* at 11-12. Thus, none of the three judges on the *Homans* panel regarded *Buckley* as an

absolute or *per se* condemnation of spending caps for political campaigns.[1]

The majority opinion affirmed on the legal ground that the City had not offered any justification for its spending limit not already considered and rejected by the *Buckley* court. Judge Lucero concluded that *Buckley* did not foreclose consideration of the interests urged by the City, but that the evidence the City presented failed to satisfy the strict scrutiny standard imposed by *Buckley*. The majority opinion agreed with Judge Lucero's assessment of the deficiencies in the City's factual showing, but determined that consideration of the facts was unnecessary, in light of the failure of the City to identify interests different from those addressed in *Buckley*. In sum, the *Homans* opinion arrived at the correct conclusion because the City's defense of its spending limit was factually and legally inadequate.

---

[1] Mr. Homans argued that the *Buckley* opinion created such a ban because the *Buckley* court affirmed a successful facial attack on the spending limits imposed by the 1974 amendments to the Federal Electric Campaign Act. By definition, a facial challenge requires the challenger to establish that "*no set of circumstances exists* under which the [a]ct would be valid." *United States v. Castillo*, 140 F.3d 874, 879, n.3 (10th Cir. 1998) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (emphasis in original). The *Homans* court, however, did not adopt this reasoning.

II. THE CITY'S PETITION INCORRECTLY POSITS A SPLIT BETWEEN THE TENTH AND SECOND CIRCUITS CONCERNING WHETHER *BUCKLEY* ABSOLUTELY PROHIBITS CAMPAIGN LIMITS.

The City's principal argument for reviewing the *Homans* opinion rests on the false premise that the Tenth Circuit applied *Buckley* as if it created a *per se* barrier to campaign spending limits. *Pet.* at 7 ("Judge Tymkovich's opinion . . . viewed *Buckley* as an absolute bar to spending limits regardless of the factual circumstances and legal interests supporting the limits."); at 11 ("The Tenth Circuit's ruling . . . views *Buckley* as forever foreclosing the constitutionality of [expenditure] limits, improperly treating First Amendment strict scrutiny as an automatic death knell for expenditure limits.") The City contrasts this purportedly categorical interpretation with the Second Circuit's reading of *Buckley* in *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004) (petition for rehearing pending). *Pet.* at 11, 12, 13, 14, 16. The City contends that the Tenth and Second Circuits have thus disagreed on whether *Buckley* forecloses the possibility that spending limits could be justified by compelling governmental interests. *Pet.* at 2, 12.

As demonstrated above, the City's characterization of the *Homans* opinion is inaccurate. The majority opinion and Judge Lucero's opinion stressed repeatedly that *Buckley* could not be viewed as an absolute prohibition against spending limits. *See, e.g., App.* at 11 (Judge Lucero disagreeing with appellees' contention that *Buckley* imposes a *per se* ban on all candidate expenditure restrictions); at 29 (majority opinion agreeing that strict scrutiny does not require automatic invalidation of governmental regulations), at 30 (majority opinion agreeing "that the

Buckley Court did not adopt a *per se* rule against campaign spending limits."). Indeed, Judge Lucero's opinion and the majority opinion cited *Grutter v. Bollinger*, 539 U.S. 306 (2003), in support of the same proposition urged by the City: that strict scrutiny is not "strict in theory, but fatal in fact." *Compare App.* at 11, 29 *with Pet.* at 16 ("strict scrutiny is still *scrutiny*, not a 'straightjacket that disables Government from responding to serious problems.'") (quoting *Denver Area Educ. Telecomm's Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996)). The *Landell* opinion also makes precisely this point, using precisely the language quoted in the *Homans* opinion. *See Landell*, 382 F.3d at 112 ("Indeed, the Supreme Court has been clear in its rejection of the view that strict scrutiny is strict in theory, but fatal in fact.") (internal quotations and authorities omitted).

The City's portrayal of a split between the Second and Tenth Circuits thus arises from a mischaracterization of the *Homans* ruling. The majority opinion and Judge Lucero's opinion expressly disavowed the *per se* reading of *Buckley* incorrectly attributed to them by the City. The majority opinion instead concluded, correctly, that the City had offered no justifications for its campaign spending limit not already passed upon in *Buckley*.

III. THE ALBUQUERQUE ORDINANCE, AND THE RECORD OFFERED IN ITS DEFENSE, PROVIDE A POOR SETTING FOR CONSIDERING WHETHER PROTECTING THE TIME OF OFFICEHOLDERS FROM THE BURDENS OF FUNDRAISING IS A COMPELLING STATE INTEREST.

The *Homans* and *Landell* opinions do differ in their assessment of whether preserving officeholders' time from

the burdens of fundraising is a compelling state interest which might justify spending limits. The majority opinion in *Homans* concluded that this interest had been addressed and rejected in *Buckley*. *App.* at 34-39. Judge Lucero concluded that, although the *Buckley* Court had not weighed preservation of officeholder time as a possible reason for spending limits, the evidence the City had submitted was not sufficient to show that spending limits are necessary to further this interest. *App.* at 23.

Obversely, the majority in *Landell* held that the record in that case demonstrated that Vermont's interest in protecting the time of candidates and elected officials from fundraising could justify spending limits. *Landell*, 382 F.3d at 124-125. Judge Winter, dissenting, recounted at length the record from *Buckley* confirming that the interest in reducing the burdens of fundraising on officeholders was squarely presented to and considered by the Court of Appeals and the Supreme Court in *Buckley*. 382 F.3d at 188 nn.24-27. This is the only significant difference between the legal holdings of the Second and Tenth Circuits.

The *Homans* case, however, offers a poor setting for weighing (or reweighing) the sufficiency of the government's interest in preserving the time of officeholders. First, the City's campaign spending limit makes no distinction between officeholders seeking reelection and challengers. It imposes the same limit on both kinds of mayoral candidates. In doing so, it disregards the significant differences between the state's interest in protecting the time of an elected official, an officer of the state, and in protecting the time of challengers. Judge Lucero's opinion, for example, emphasized the difference between the City's interest in protecting officeholders, as opposed

to challengers, from the burden of fundraising. *App.* at 22 ("the woes of poor challengers aside, such campaigns distract *officeholders* from performing their official duties.") (emphasis in original). The majority opinion agreed that the "woes of under-funded challengers and the distractions of officeholders are not the same," but concluded that "[b]oth concerns are, however, aspects of the broader interest in controlling the costs of campaigns, an issue the *Buckley* Court did consider and firmly reject." *App.* at 35.

The statute at issue in *Landell*, Act 64, permitted incumbents to spend only 85% (or 90%, in the case of incumbent candidates for the General Assembly) of the limit imposed on challengers. 382 F.3d at 99. This differential serves to neutralize the advantages incumbents often enjoy from free media exposure. *Id.* at 128. It also corresponds with the state's more significant interest in protecting the time of its officers.

In contrast, the spending limit at issue in *Homans* imposes the same spending restrictions on incumbents and challengers. It thus improperly fails to account for the differences between the state's interest in preserving officeholder time and in preserving a challenger's time. It instead imposes the same burden to accomplish very different interests.

The City's spending limit also fails to differentiate between contributed monies and the candidate's own resources. "The central holding in *Buckley* is that spending money on one's own speech must be permitted[.]" *App.* at 31 (quoting *Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 627 (1996) (Kennedy, J., concurring in part and dissenting in part)). The state's interest in a spending limit obviously varies depending

upon whether a candidate uses contributed funds or his own funds, and an officeholder whose own funds permit him to finance a reelection campaign independently would be free from the burdens of fundraising. This Court has routinely struck down limitations on independent expenditures by candidates. *App.* at 31. The spending limit therefore cannot be fairly characterized as "narrowly tailored" to serve either an anti-corruption or preservation of time interest. These "tailoring" defects detract significantly from the defensibility of the spending limit.

The clear "tailoring" deficiencies in the City's campaign spending limit provide case-specific, narrow grounds for affirming the rulings of the Tenth Circuit and the trial court in this case. Apart from whether *Buckley* is a *per se* ban against campaign spending limits, whether protection of officeholder time is a compelling state interest, or whether *Buckley* should be overruled, the City's campaign spending limit is plainly an exercise in overkill. It overshoots anti-corruption interests by imposing the same spending limit on contributed funds as it imposes on a candidates' own money. It over-protects any interest in preserving the time of officeholder by imposing the same limit on challengers and incumbents. In light of the pre-*Buckely* origins of the City's campaign spending limit, satisfaction of the "narrow tailoring" requirement imposed by *Buckley* would have been a lucky guess. The City's legal and factual justifications for the campaign spending limit, and its scope, are necessarily *post hoc*. *See, e.g., United States v. Virginia,* 518 U.S. 515, 533 (1996) ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.").

In circumstances such as these, consideration of the tailoring problems in the City's spending limit would

wisely avoid the broader constitutional issues this case presents. *See, e.g., Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 573-574 (1987) (holding that overbreadth of a resolution banning "First Amendment activities" at Los Angeles International Airport obviated a decision about whether the airport was a public forum). Principles of judicial restraint favor resolution of constitutional issues on the narrowest possible grounds. *See, e.g., Air Courier Conf. of America v. American Postal Workers Union, AFL-CIO*, 498 U.S. 517, 531 (1991) (Stevens, J., concurring). "The Court has long insisted . . . on keeping constitutional adjudication, when unavoidable, as narrow as circumstances will permit." *Staub v. City of Baxley*, 355 U.S. 313, 330 (1958) (Frankfurter, J., dissenting). Regardless whether the City has compelling interests in preventing corruption or in preserving officeholder time, the City's spending limit is too broad to pass the "narrowly tailored" test.

Furthermore, the record in this case contains scant evidence relating to the City's proferred interest in preserving the time of officeholders. The City cites the testimony of only two City officeholders, former Mayor Jim Baca and former Council Member Dede Feldman. *Pet.* at 22. Former Mayor Baca recounted his experience of being "forced to spend three hours every day making fundraising phone calls." *Pet.* at 22. Former Mayor Baca does not disclose, however, whether he spent three hours per day fundraising for a period of several weeks, for months, or for only a few days. Ms. Feldman's testimony is even less helpful. She merely pointed out that, as a state senator not subject to spending limits, she "spent a lot more time fundraising" than she did as a City Council candidate. *Pet.* at 22.

The magnitude of the City's interest in protecting the time of officeholders necessarily bears some relation to what the evidence shows about the time City officeholders spend on fundraising. Yet, the City failed to provide such evidence.

The breadth of the City's spending limit and the factual record offered in support of it thus make this case an inadequate laboratory for testing the City's interest in protecting the time of officeholders from fundraising. In contrast, the record submitted in *Landell* in support of Act 64 appears to offer a much more suitable environment for such a test. *See Landell*, 382 F.3d at 121-124 (describing some of the "powerful evidence" of time pressures imposed by fundraising on candidates, including officeholders). The *Homans* opinion is not the right case for undertaking an analysis of the purportedly "new" state interest in protecting the time of officeholders, even assuming such an interest is truly new.

IV. THE COURT SHOULD NOT OVERTURN *BUCKLEY V. VALEO.*

The doctrine of *stare decisis* protects the legitimate expectation of a society living under the law. *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring). The doctrine reflects "a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997)) (internal quotation marks omitted). Even in constitutional cases, the doctrine is so influential that this Court has always required a departure from precedent to be supported by some special

justification. *Dickerson v. United States*, 530 U.S. 428, 443 (2000); *United States v. IBM*, 517 U.S. 843, 856 (1996).

The City offers no special justification for disregarding *stare decisis* and discarding *Buckley*. The *Buckley* approach has proven adaptable and flexible by permitting governments to impose contribution limits, disclosure requirements, and other measures promoting electoral health, while respecting the rights of political candidates to spend the money required to express their political views. As the *Homans* court noted "*Buckley*'s strong affirmation of the free speech rights associated with campaign spending has remained essentially untouched for nearly thirty years." *App.* at 29 (citing *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 124 S. Ct. 619, 655 (2003)). The central holding in *Buckley* on campaign spending limits has "stood the test of time, both from judicial tinkering and legislative onslaught." *Id.* The City cannot fault the wise constitutional balance struck in *Buckley* between the freedoms essential to the proper operation of our political system and the state's interest in preventing corruption, or its appearance, in the election process.

CONCLUSION

The Court should deny the City's petition.

Respectfully submitted,

KELEHER & MCLEOD, P.A.
THOMAS C. BIRD
RICHARD L. ALVIDREZ
Post Office Box AA
Albuquerque, N.M. 87103
(505) 346-4646
(505) 346-1370 (fax)

Counsel for Respondent
Rick Homans

(11)

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In The Supreme Court of the United States

THE CITY OF ALBUQUERQUE,
a municipal corporation, *et al.*,

Petitioners,

v.

RICK HOMANS and SANDER RUE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BRENDA WRIGHT
Counsel of Record
LISA J. DANETZ
JOHN C. BONIFAZ
NATIONAL VOTING RIGHTS INSTITUTE
27 School Street, Suite 500
Boston, MA 02108
(617) 624-3900

ROBERT M. WHITE
City Attorney
City of Albuquerque
RANDY M. AUTIO
Deputy City Attorney
City of Albuquerque
P.O. Box 2248
Albuquerque, NM 87103
(505) 768-4500

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. THERE IS A CLEAR CONFLICT BETWEEN THE SECOND AND TENTH CIRCUITS.

The Tenth Circuit majority opinion[1] imposes a *per se* ban on candidate spending limits and therefore conflicts with the Second Circuit holding in *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), which allows a court to consider new facts and legal interests not considered by the *Buckley* court. Although the majority opinion gives a perfunctory nod to the notion that "strict scrutiny does not require automatic invalidation of governmental regulations," App. 29, it is quite emphatic that there is *no evidence* that possibly could be presented to uphold the spending limits. *See* App. 28 ("[U]nder *Buckley* such restrictions cannot be supported as a matter of law. . . . Since all three of the asserted interests are thus constitutionally incapable of justifying spending restrictions as a matter of law, the court need not entertain the evidence submitted by the City."); App. 31-32 ("One can safely conclude that *Buckley* forecloses a finding that spending limitations can be narrowly tailored to further governmental justifications other than the anti-corruption interest sustained by the Supreme Court, no matter what evidence may be presented."); App. 34 ("[C]andidate spending limitations cannot be justified by the anti-corruption rationale. . . . I doubt that any evidence would sustain such limitations under *Buckley*."). This is no different than a *per se* ban.

Moreover, there is a clear conflict between the two Circuits as to whether the state interests *both* in deterring the reality and appearance of corruption *and* in preserving the time of officeholders and candidates are sufficiently compelling to support candidate spending limits. *See* Cert.

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[1] As in the Petition for Writ of Certiorari, the phrase "majority opinion" refers to the opinion of Judge Tymkovich. *See* Cert. Pet. at 7.

Pet. at 19-22; *compare* App. 28, 31-32, 34 *with Landell*, 382 F.3d at 124 ("[W]e conclude that Vermont has established at least two interests in maintaining campaign expenditure limits: preventing the reality and appearance of corruption, and protecting the time of candidates and elected officials.").

Counsel for respondent Rue have acknowledged, in their Petition for Rehearing *En Banc* on behalf of plaintiffs in *Landell*, that the opinion below imposes a *per se* ban and "specifically reject[s both] the time and corruption interests." Petition for Rehearing *En Banc*, *Landell v. Sorrell*, No. 00-9159 (L) (2d Cir. docketed Sept. 1, 2004), at 1 (hereafter "*Landell* Reh'g Pet.") (stating the decision "hold[s] spending limits to be unconstitutional as a matter of law and specifically reject[s] the time and corruption interests embraced here."). In that Petition, counsel also stated, "The notion that the constitutionality of spending limits remains an open question to be determined by the facts of each case was directly rejected [by the Tenth Circuit]." *Id.* at 5.

II. JUDGE LUCERO'S OPINION DOES NOT ELIMINATE THE CONFLICT BETWEEN THE TENTH AND SECOND CIRCUITS.

The Rue opposition posits Judge Lucero's opinion, which it characterizes as consistent with *Landell*, as an alternative holding on which the Tenth Circuit majority relied. As already noted, however, although nominally concurring with Judge Lucero's factual discussion, *see* App. 27-28, 34, the majority opinion is emphatic that the factual record before the Court was unimportant. Therefore, Judge Lucero's opinion simply does not rise to the level of an alternative holding. Rue's counsel's statement to the *Landell* court – "that the constitutionality of spending limits

remains an open question to be determined by the facts of each case was directly rejected" – is an accurate assessment of the Tenth Circuit decision. *Landell* Reh'g Pet. at 5.

Even so, an examination of Judge Lucero's opinion reveals errors of law that entirely preclude it from serving as a viable alternative holding. For example, Judge Lucero faults the City because there is no evidence of corruption in Albuquerque rising to the level of the evidence before the Court in *Buckley*, which "smelled of actual quid pro quo." App. 20. Although Petitioners have addressed this argument, *see* Cert. Pet. at 17-21 & n.13, it is worth pointing out that one would not expect to find extensive evidence of corruption in Albuquerque – nor can the lack of such evidence logically mean that spending limits are unnecessary – because Albuquerque has had both contribution limits and spending limits since 1974.[2] *See, e.g., Colorado Republican Federal Campaign Committee v. FEC*, 533 U.S. 431, 457 (2001) (noting difficulty of proving harms that would exist in absence of long-enforced statute). Indeed, the fact that Albuquerque has been free of the kind of corruption seen elsewhere and that its citizens do express confidence in government clearly *supports*, rather than *undermines*, the case for upholding the City's spending limits.

Judge Lucero also inappropriately discounted the City's evidence regarding the federal experience with limited contributions and unlimited spending. Local governments are entitled to rely on the experiences of other jurisdictions – including the federal government – in assessing the need for particular campaign finance regulations. *Nixon v.*

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[2] In the 1974 vote to amend the City Charter, the election code (including spending limits) constituted its own proposition on the ballot. Rue App. 561-562, 568, 571.

Shrink Missouri Gov't PAC, 528 U.S. 377, 394 n. 6 (2000); *Missouri Repub. Party v. Lamb*, 270 F.3d 567, 570 (8th Cir. 2001) (state entitled to rely on evidence of circumvention in federal elections to justify state limits on political party contributions).

Finally, Judge Lucero's discussion of the facts ignores the standards governing summary judgment. "[I]n ruling on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in that party's favor.'" *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)) (reversing grant of summary judgment to plaintiffs who challenged redistricting plan as racially motivated). Judge Lucero did not do so.

To provide but two of many examples of error in Judge Lucero's opinion, each of which improperly negates a part of the City's evidence regarding the vibrancy of Albuquerque's elections: The opinion impermissibly weighs the turnout and electoral competition evidence submitted by the parties and then resolves the factual disputes against the City. App. 17-18, 26. Thus, Judge Lucero concludes that (1) turnout in Albuquerque is no better than in comparable cities, and (2) spending limits have not enhanced electoral competition. Because the City's evidence is decidedly to the contrary, Judge Lucero's findings constitute error.[3]

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[3] For example, Homans presented no evidence disputing the conclusions of the City's expert concerning turnout, and the City's expert showed that, once an obvious error offered by Rue's expert was corrected, Albuquerque's turnout rate of 28.3% (as a percentage of eligible voters) was higher than any of the comparable cities listed in the reference work for the relevant period (1974-1989). Rue App. 469, 861. In addition, it is undisputed that mayoral incumbents in Albuquerque have been far more vulnerable to challenge than in cities

(Continued on following page)

These erroneous applications of governing law negate the validity of Judge Lucero's opinion as an alternative holding.[4]

III. *BUCKLEY* DOES NOT PRECLUDE THE TIME-PROTECTION INTEREST.

Both Rue and Homans argue that the *Buckley* Court considered and rejected the interest in preserving the time of officeholders and candidates. As the Petition demonstrates, their argument is in error. Cert. Pet. at 23-25.

In any event, no one could pretend there was the kind of time pressure on candidates in 1976 that there is today, when costs have risen to approximately $900,000 and $5 million for average winning congressional and Senate elections, respectively. *See* http://www.opensecrets.org/bigpicture/stats.asp?cycle=2002 (regarding 2002 election cycle) (visited November 2, 2004).[5] Adjusted for inflation, the cost of a winning campaign for both the House and Senate rose by over 150% between 1986 and 2000. *See Amici* Brief of Former Senators Bill Bradley and Alan Simpson ("Bradley/Simpson Br."), at 4. To make that concrete, "In 1992, the average Senator had to raise nearly $13,000 *each week* for the entire six-year term in order to

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without spending limits, and a high percentage of city council elections have been contested and have had close margins of victory. *See* Rue App. 440-441, 819-823, 854-858.

[4] If Judge Lucero's opinion is "an alternative holding" or somehow consistent with the Second Circuit approach (notwithstanding a direct conflict between the holdings), then the Tenth Circuit instead conflicts with the Sixth Circuit, which clearly imposes a *per se* ban. *See Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998); *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998).

[5] Expert witness Larry Makinson testified that the average cost for winning a seat in the House of Representatives grew from $100,000 in 1974 ($200,000 in 2001 dollars) to $840,000 in 2000. Homans App. 207.

amass the amount that a winning Senate race would cost." *Id.* n.3 (emphasis added) (*citing* Herbert Alexander, *Financing Politics: Money, Elections, and Political Reform* 54 (1992)). The pressures are even greater today, and exist at the local level as well. Homans App. 212; Rue App. 709. The time spent raising money comes at the cost of fulfilling the duties for which officeholders are elected. Bradley/Simpson Br. at 3-12; *see also Amici* Brief of Senator Ernest F. Hollings *et al.* ("Hollings Br."), at 7-10.

The records in these cases present ample evidence supporting the interest in preserving the time of officeholders and candidates. Both fact and expert witnesses attested to the effect of the arms' race mentality, in which each candidate feels compelled to continue fund-raising to ensure that s/he is not outspent by an opponent, on the performance of official duties. *See* Homans App. 512 (Jim Baca); Rue App. 704-705 (Michael Cadigan); Rue App. 708-709 (Dede Feldman); Homans App. 467-482 and Rue App. 585-601 (Martin Schram); Homans App. 212-214 and Rue App. 636-638 (Larry Makinson).

In short, the experience since *Buckley* has proven that the constant need to raise funds to compete in the campaign spending arms' race fundamentally distorts "the core functioning of representative democracy."[6] Hollings Br. at 8.

IV. THE PROPOSED ALTERNATIVES DO NOT ADDRESS THE TIME-PROTECTION INTEREST AS WELL AS CANDIDATE EXPENDITURE LIMITS.

Respondents' oppositions provide suggested alternatives to spending limits, which the oppositions claim are

[6] The distorting effect is just as great upon elected judges and the judiciary. *See Amici* Brief of Current and Former State Court Justices and Judges, at 3-7.

more narrowly tailored to solving the problem of candidates spending excessive time on fundraising. Because the Rue case was decided on summary judgment, there was no opportunity for factual findings on narrow tailoring. And, in the proceedings below, Respondent Homans did not offer any alternatives. Nevertheless, none of the proposed alternatives fits the time-protection interest better than spending limits.

Narrow tailoring "does not require exhaustion of every conceivable . . . alternative." *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). Nor does it require the City to choose to address only one of many different compelling interests. *Id.*; *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-510 (1989) (city had many alternatives that "would have [had] little detrimental effect on the city's [other] interests"); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (alternatives must serve the interest "about as well" and at "tolerable administrative expense") (citations omitted). In addition, for any of the proposed alternatives to render spending limits insufficiently tailored, the proposed alternatives must be workable. *Grutter*, 539 U.S. at 339.

None of the proposed alternatives to spending limits is workable because none addresses the arms' race mentality that creates a never-ending quest for additional funds and threatens to crowd out democratic representation.

Increasing contribution limits: Increasing contribution limits is a poor fit for addressing the time-preservation interest because doing so undermines the compelling interest in deterring the reality and appearance of corruption. *See Buckley v. Valeo*, 424 U.S. 1, 23-38 (1976) (noting that large donations foster corruption and its appearance); *cf.* Hollings Br. at 8. The Constitution does not obligate the City to choose between deterring the reality or appearance

of corruption, on the one hand, and preserving the time of officeholders and candidates, on the other.

Making city councilor a full-time position so that City Council members would not need outside jobs: As an empirical matter, it is clear that this alternative does not solve the problem; federal officeholders, whose positions are all "full-time," are nevertheless extraordinarily consumed with fundraising. *See* Homans App. 212-214 (testimony of Larry Makinson); *see also* Bradley/Simpson Br. at 3-13; Hollings Br. at 7-8. Without spending caps, eliminating outside jobs held by City Councilors would simply "free" them to spend more time fund-raising so as to avoid being bested in the campaign spending arms' race.

Increasing the size of the city council or providing more staff to the councilors to reduce the burden on each individual: These alternatives are so self-evidently insufficient to address the problem that Respondent Rue did not even mention them before the courts below. As with the other proposed alternatives, they are unworkable because they do not address the core problems resulting from unlimited campaign spending.

Setting Lower Limit for Incumbent than for Challenger: The Tenth Circuit did not rule against the City for its failure to impose different spending limits on incumbents and challengers, and Respondent Homans did not raise this alternative below. In any event, the remarkable success of challengers in defeating mayoral candidates in Albuquerque demonstrates that spending limits make elections more competitive for challengers even without differential limits.

Setting No Limit on Self-Funded Candidates: A system in which most but not all candidates, even those in the same race, are subject to spending limits is unworkable. Our electoral system is comprised of rules that apply to all candidates. To achieve the goals of deterring the

reality and appearance of corruption, and of preserving the time of candidates and officeholders, spending limits must be imposed on all candidates.

Only candidate spending limits, by setting a target amount for candidates and by providing knowledge of how much an opponent will spend, prevent the arms' race mentality that spurs a never-ending quest for funds. That mentality leads directly to the inordinate amount of time that officeholders and candidates spend fund-raising from, and attending to, donors. Respondents' proposed alternatives do not address this distortion of democracy.

V. IF THE COURT BELIEVES THAT *BUCKLEY* BARS SPENDING LIMITS, THEN OVER 25 YEARS OF EXPERIENCE JUSTIFY DEPARTURE FROM *STARE DECISIS*.

As Petitioners have argued, *Buckley v. Valeo* need not be overruled in order for the Court to reverse the Tenth Circuit decision. Cert. Pet. at 12-26. Nevertheless, if the Court views *Buckley* as an obstacle, Petitioners contend that the time has come to revisit its decision regarding candidate spending limits.

The principle of *stare decisis* is a "principle of policy," rather than an "inexorable command." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996). When decisions are "unworkable," the Court "'has never felt constrained to follow precedent.'" *Id.* (*quoting Payne v. Tenn.*, 501 U.S. 808, 827 (1991). Indeed, this Court has deviated from *stare decisis* when it "has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.'" *Vazquez v. Hillery*, 474 U.S. 254, 265-266 (1986) (*quoting Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)). The willingness to reconsider earlier decisions is "particularly true in constitutional cases" because, in

such cases, legislative correction is "practically impossible." *Seminole Tribe*, 517 U.S. at 63.

The campaign finance regime of limited contributions and unlimited spending simply has proven unworkable. It is entirely ineffective in dealing with the reality and appearance of corruption and undue influence. And it has allowed the emergence of an arms' race mentality in which no candidate feels safe stepping off the treadmill of fund-raising. As the *Homans* district court stated, "As the cost of elections rise, candidates for office at every level of federal, state and city government are under a great deal of pressure to engage in fundraising activities and to depend on the good will of their donors." App. 49. Turning officeholders into full-time fundraisers impairs the ability to carry out their duties as representatives and impairs the ability of candidates to spend time attending to the needs of ordinary citizens.

For all these reasons, if the Court views *Buckley* as compelling affirmance of the majority opinion, Petitioners respectfully request that the Court revisit that decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BRENDA WRIGHT
Counsel of Record
LISA J. DANETZ
JOHN C. BONIFAZ
NATIONAL VOTING RIGHTS INSTITUTE
27 School St. Suite 500
Boston, MA 02108
(617) 624-3900

City of Albuquerque
ROBERT M. WHITE
City Attorney
RANDY M. AUTIO
Deputy City Attorney
P.O. Box 2248
Albuquerque, NM 87103
(505) 768-4500

Attorneys for Petitioners

(6)

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In The

Supreme Court of the United States

CITY OF ALBUQUERQUE, NEW MEXICO,

Petitioner,

v.

RICK HOMANS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICI CURIAE* FORMER SENATORS BILL BRADLEY AND ALAN SIMPSON IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

MARK C. ALEXANDER
SETON HALL UNIVERSITY
SCHOOL OF LAW
One Newark Center
Newark, New Jersey 07102
(973) 642-8523

JOHN J. GIBBONS
LAWRENCE S. LUSTBERG
MEGAN E. LEWIS
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE, P.C.
One Riverfront Plaza
Newark, New Jersey 07102
(973) 596-4500

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF INTERESTS OF *AMICI CURIAE*

Amici former Senators Bill Bradley and Alan Simpson urge the Court to grant the petition for a writ of certiorari. This case addresses a constitutional question of great magnitude concerning the application of this Court's First Amendment jurisprudence in the context of campaign finance reform.[1] The issue presented herein is whether the City of Albuquerque's campaign expenditure limits are justified by a compelling government interest.

Bill Bradley is a former United States Senator, and a Democrat from New Jersey. He was first elected to the United States Senate in 1978, and served three full terms, from 1979 to 1997. In addition, Senator Bradley ran for the Democratic Party nomination for President of the United States in the 2000 election cycle.

Alan Simpson is a former United States Senator, and a Republican from Wyoming. He was also first elected to the United States Senate in 1978, and served three full terms, from 1979 to 1997.

Having served the nation in the United States Senate, *amici* swore an oath to "support and defend the Constitution of the United States" and to "well and faithfully discharge the[ir] duties."[2] In addition to their service in

---

[1] Counsel for all parties have consented to the filing of this brief, and *amici* have filed those consents with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the undersigned *amici* and their counsel, has made a monetary contribution to this brief's preparation and submission.

[2] http://www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm.

the Senate, *amici* have raised millions of dollars for their campaigns, for their respective parties, and for other candidates. *Amici* are proud of their service in the legislative branch; however, as former members of a coordinate branch, they feel compelled to advise the Court of their utmost concern for the problem presented. With a sense of continuing obligation to serve to the nation, *amici* file this brief in support of the petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

This case raises the question whether the immense time commitment of fundraising detracts excessively from the effective performance of duty by elected officials. *Amici* posit that due to the demands of fundraising, it is difficult for elected officials to fulfill their duties, and that the Constitution therefore permits government to place limits on campaign expenditures. For this reason, the Court should grant this petition for certiorari to address the constitutionality of the City of Albuquerque's campaign expenditure limits. The instant case provides the Court with an opportunity to consider issues central to the integrity of our system of representative democracy, as States and localities across the nation seek to address the impact of fundraising on campaigns and on officials' performance in elected office.

The petition for a writ of certiorari should be granted because there is a compelling government interest in protecting the time of elected officials from the excessive demands of fundraising. Without limits on campaign expenditures, campaign costs have escalated and fundraising has become an inordinately time-consuming job for

candidates and office holders fearful of being out-matched by their opponents' spending. As a result, the ability of elected officials to perform their duties has diminished, the quality of representation has declined, and the integrity of elected office has been undermined. Preserving the time of elected officials from the burdens of constant fundraising presents a compelling interest supporting campaign expenditure limits, an interest which was not before the Court in *Buckley v. Valeo*, 424 U.S. 1 (1976).

REASONS FOR GRANTING THE WRIT

I. THE SPIRALING COSTS OF CAMPAIGNS TAKES ELECTED OFFICIALS AWAY FROM THEIR SWORN DUTIES.

A. In the Absence of Spending Limits, Campaign Costs in Federal, State and Local Elections Have Escalated.

In the 28 years since the Court decided *Buckley v. Valeo*, the costs of running a successful campaign for local, state or national office have rapidly escalated. In 1978, *Amicus* Senator Bradley spent $1,688,499 in his campaign for a United States Senate seat in New Jersey. CENTER FOR RESPONSIVE POLITICS, BILL BRADLEY; bradbil.pdf, *available at* http://www.opensecrets.org. In 1990, a mere 12 years later, *Amicus* Senator Bradley spent nearly $12.5 million in his reelection bid, raising approximately forty thousand dollars per week, every week for six years. Likewise, in the 1990 senatorial race in Wyoming, *Amicus* Simpson spent $1,443,298 to win re-election, 3.3 times the amount spent in 1978. CENTER FOR RESPONSIVE POLITICS, ALAN SIMPSON; simpsala.pdf, *available at* http://www.opensecrets.org.

Overall Congressional candidate fundraising increased 425 percent between 1978 and 2000, compared to 170 percent inflation during the same period. U.S. PUBLIC INTEREST RESEARCH GROUP, LOOK WHO'S NOT COMING TO WASHINGTON 7 (2003). From 1986 to 2000, the average cost of a successful campaign for the United States House of Representatives rose from $359,577 to $848,296. *Id.* Adjusted for inflation, this amounts to a 151 percent increase. Similarly, the average victorious Senate campaign in 1986 cost $3,067,559 compared to $7,389,176 in 2000 – a 154 percent increase, adjusted for inflation. *Id.*[3]

In the realm of presidential politics, spending has escalated at an even more alarming rate. In his bid for the Democratic Presidential Nomination in 2000 Senator Bradley, although no longer a member of the Senate, raised $8,607,781 in campaign contributions in his most successful fundraising quarter. FEDERAL ELECTION COMMISSION, "Large Fundraising Quarters in Pre-Election Years For Presidential Primary Campaigns" *available at* http://www.fec.gov (measured from October 1, 1999 through December 31, 1999). Sitting Vice President Al Gore, the eventual Democratic Party nominee for President, had his largest fundraising quarter in the first quarter of 1999 during which time he raised $8,881,976. *Id.* (measured from January 1, 1999 through March 31,

[3] The following breakdown is particularly noteworthy. In 1992, the average Senator had to raise nearly $13,000 each week for the entire six-year term in order to amass the amount that a winning Senate race would cost. Herbert Alexander, FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM 54 (1992). By 2001, Senator Barbara Boxer estimated that for a successful Senate campaign in California, a candidate would need to raise $10,000 *per day*. 145 Cong. Rec. S 12575, S 12608 (daily ed. Oct. 14, 1999) (statement of Senator Barbara Boxer).

1999). Seeking the Republican Party's nomination in 2000, then-Governor George W. Bush dwarfed all previous fundraising quarters in history when, in the second quarter of 1999, he raised $29,484,602 in ninety-one days while serving as the Governor of Texas. *Id.*

Yet the 2000 election cycle pales in comparison to the current presidential election, which has shattered all previous fundraising records. Both major party nominees opted out of the public financing system for their respective party's primary campaigns and had raised a combined total of $472.3 million by August 31, 2004, prior to accepting public financing for the General Election. *Report of Receipts and Disbursements: Bush-Cheney '04 Inc.*, filed 9/20/04, *available at* http://www.fec.gov; *Report of Receipts and Disbursements: John Kerry for President Inc.*, filed 9/20/04, *available at* http://www.fec.gov. To achieve these record sums, the two candidates combined had to raise at least one million dollars per day for well over a year.

B. As a Result of Spiraling Campaign Costs, Elected Officials Spend An Excessive and Ever-Increasing Proportion of Their Time Raising Funds for the Purposes of Re-election and Election to Higher Office.

As a result of spiraling campaign costs, elected officials spend an excessive and ever-increasing proportion of their time raising funds for the purposes of re-election and election to higher office.[4] Senators and Members of Congress

[4] *See, e.g.*, 147 Cong. Rec. S 2603 (daily ed. Mar. 21, 2001) (statement of Senator Richard Durbin) ("The whole process has been tainted . . . by the fact that so many candidates, myself included, spend so many waking hours trying to raise money to launch an effective

(Continued on following page)

spend many hours each week – and sometimes each day – raising money, "dialing for dollars,"[5] and attending fund-raisers for themselves and for others.[6] As Senator Dennis DeConcini said, "The worst thing about it is that members have to spend so much time in the pursuit of campaign finances that I think their ability to do really their best as legislators is jeopardized . . . When I was running, I was spending about two hours a day on the phone raising money. Minimum. Six days a week. That takes away from your ability to represent your constituents, or to do your legislative work, or what have you." Martin Schram, SPEAKING FREELY 38. Elected officials also travel frequently in order to raise money, not only within their own states, but also to other states with high concentrations of wealthy donors.[7]

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campaign."); 133 Cong. Rec. S 7782 (daily ed. Sept. 21, 1997) (statement of Senator Harry Reid) (stating that when he ran for the Senate while he was a member of the House of Representatives, he spent the "vast majority" of his time raising money); Martin Schram, SPEAKING FREELY 38-43 (1st ed. 1995) (setting forth interviews with current and former Republican and Democratic Senators and Representatives in which the elected officials agreed that escalating campaign costs forced them to spend too much time raising money); Dan Clawson, et al., MONEY TALKS: CORPORATE PACS AND POLITICAL INFLUENCE 203-04 (1992); Frank J. Sorauf, MONEY IN AMERICAN ELECTIONS 183-84 (1988).

[5] *See* John Harwood, *For California Senator, Fund Raising Becomes Overwhelming Burden*, Wall St. J., Mar. 2, 1994, at A1 (quoting Senator Diane Feinstein: "My people want me . . . to be on the phone all the time.").

[6] *See* Schram, SPEAKING FREELY 38 ("The time that you spend raising money, and the number of fund-raising events I was obliged to attend or at least stop by – gosh, you'd have five or six a night. It just wears you out doing that," Statement of House Minority Leader Robert Michel; and "[Fundraisers] three evenings per week, plus 10 to 12 hours in your own races," Statement of Representative Dave Durenberger).

[7] For example, in 1986 then-Representative Thomas A. Daschle of South Dakota flew to California more than twenty times, visiting Los

(Continued on following page)

Moreover, in order to meet the inordinate demands of a successful fundraising effort, elected officials begin campaigning for their next race the day they take office. This frenetic fundraising pace continues throughout their terms. "As soon as a Senator is elected here," said Senator Tom Harkin, "that Senator better start raising money for the next election 6 years down the pike." 134 Cong. Rec. S 1053 (daily ed. Feb. 22, 1988). Senator Robert Byrd, former Majority Leader, similarly observed: "To raise the money, Senators start hosting fundraisers years before they next will be in an election. They all too often become fundraisers first, and legislators second." 138 Cong. Rec. 115 (daily ed. Jan 6, 1987).[8] As one Republican Congressman said: "[Fundraising] devours one's time – you spend two or three years before your re-election fundraising. The other years, you're helping others." *See* Peter Lindstrom, CENTER FOR RESPONSIVE POLITICS, CONGRESS SPEAKS: A SURVEY OF THE 100TH CONGRESS 80 (1988) (quoting unnamed Republican Congressman). In sum, the current

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Angeles almost as much as he did Sioux Falls, in order to raise money for media buys in his Senate race. *See* Carol Matlack et al., *Money and Politics: A Special Report*, 22 Nat'l J. 1448, 1448 (1990); *see also* Dan Clawson, et al., MONEY TALKS: CORPORATE PACS AND POLITICAL INFLUENCE 8, 9 (1992) (citing Carol Matlack, et al., *Money and Politics: a Special Report*, 22 Nat'l J. 1448, 1448 (1990)); Peter Lindstrom, CENTER FOR RESPONSIVE POLITICS, CONGRESS SPEAKS: A SURVEY OF THE 100TH CONGRESS 80 (1988) (noting that in 1992, 28% of all individual contributions above $200 collected by candidates for federal office came from donors who live outside their states.); Schram, SPEAKING FREELY 42 ("The money demands are so great, we have to go out of state . . . That's the killer," Statement of Representative Wyche Fowler).

[8] *See also* Jim Barnett, *Fund Raising Is Race Before the Race for Re-Election*, The Oregonian, Aug. 9, 1999, at A01 (describing the intensive fundraising efforts in a Congressional race more than a year prior to election).

system relentlessly pressures office holders to spend a vast amount of their time fundraising.

C. The Time Spent Fundraising Diminishes the Quality of the Representation that Elected Officials Provide, and Undermines the Integrity of the Offices They Hold.

The time spent fundraising interferes with the ability of elected officials to carry out the duties for which they were elected. "We have been transformed from a body of lawmakers into a body of full-time fundraisers." *See* James R. Carroll, *Senate Rejects Limits on Donations*, The Courier-Journal, March 27, 2001, at 1A (quoting Senator Ernest Hollings). Legislators no longer spend enough time on legislation, constituent services, committee work, oversight responsibilities, and debating or negotiating with fellow representatives. Rather, many legislators neglect these duties in favor of raising money. Representatives and Senators routinely miss important votes due to conflicts with their fundraising activities.[9] Legislators

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[9] Former Senate Majority Leader George Mitchell explained that Senators constantly wanted him to reschedule debates because "they [were] either holding or attending a fund-raising event that evening." Senator Mitchell noted that, "[i]f I put all the requests together, the Senate would never vote." Schram, SPEAKING FREELY 37-38; John Harwood, *For California Senator, Fund Raising Becomes Overwhelming Burden*, Wall St. J., Mar. 2, 1994, at A8 (noting that Senator George Mitchell "is often pestered by colleagues who don't want floor votes to conflict with fundraisers, and sometimes obliges them."); *see also* Greg Krikorian, *California and the West; Campaign Cuts Into Campbell's Voting Record*, Los Angeles Times, July 24, 2000, at A3 (detailing Representative's abysmal attendance record in Congress while campaigning for United States Senate: "[Representative] Campbell says he has no choice but to miss votes in a system that demands huge amount

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often feel that they do not have the time to meet with or directly represent their constituents. As Representative Christopher Shays lamented: "[Elected officials] spend far too much time fund-raising and not enough time listening to their constituents and doing their jobs." 148 Cong. Rec. H 339 (daily ed. Feb. 13, 2002). Former Representative Bob Edgar commented that during an election "eighty percent of my time, 80 percent of my staff's time, 80 percent of my events and meetings were fundraisers. Rather than go to a senior center, I would go to a party where I could raise $3,000 or $4,000." Schram, SPEAKING FREELY 40. The primary focus of elected officials has shifted from serving their constituents to preserving their jobs by raising money.

Elected officials recognize that the excessive demands of fundraising have caused the overall quality of the representation they provide to decline. In Congressional floor debates concerning campaign finance reform legislation, Republicans and Democrats consistently and repeatedly describe the negative impact that the time devoted to fundraising has on the quality and substance of their representation.[10] Representative Vin Weber stated that:

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of campaign money – a system he wants to change. And his opponent [Senator Diane Feinstein] is a well known, well financed incumbent.").

[10] *See, e.g.*, 145 Cong. Rec. H 8225, H 8236 (daily ed. Sept. 15, 1999) (statement of Representative Thomas Udall) ("More and more time is being spent raising money, and this translates into less time being spent doing our duties to support the public and represent our citizens . . . The high cost of campaigns is unfairly restricting dedicated, qualified people from running for public office, and is putting elected officials in a position of having to choose between spending their time doing their jobs or raising money."); 144 Cong. Rec. H 6937, H 6943 (daily ed. Aug. 3, 1998) (statement of Representative Marge Roukema) ("Our campaign finance system is out of control. Costs are skyrocketing.

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"when the members making decisions can't devote serious quality time to serious decisions, it has to [result in] a lower quality of work." Schram, SPEAKING FREELY 41. Elected officials increasingly feel that they are forced to choose between attending their sworn duties and raising money for the purposes of re-election or election to a higher office.[11] One Congressman stated that the time spent fundraising for his Senate race "crippled" his ability to fulfill his Congressional duties. Schram, SPEAKING FREELY 40.[12]

Candidates of all kinds are finding themselves devoting more time and energy to fundraising – at the expense of their public service duties."); 137 Cong. Rec. S 5858 (May 15, 1991) (statement of Senator David Boren) "When we think of the time it takes away from doing the duties we are elected to perform, we know something is wrong. When we think about the fact that Members of Congress are becoming part-time public officials, part-time policymakers."

[11] In a survey of House and Senate members and their staffs, the Center for Responsive Politics found that 52 percent of the senators surveyed thought the demands of fundraising cut significantly into the time available for legislative work. Another 12 percent believed fundraising had some deleterious effect. *See* Peter Lindstrom, Center for Responsive Politics, CONGRESS SPEAKS – A SURVEY OF THE 100TH CONGRESS (Washington, 1988); *see also* Larry Makinson, SPEAKING FREELY 39 (2d ed. 2003) ("[T]he dialing for dollars is to get somebody elected. The protecting the dollars [of their constituents] is one of the primary legislative responsibilities. And too often, one comes at the expense of the other," Statement of Representative Tom Roemer); Schram, SPEAKING FREELY 38, 42-43 ("I needed to constantly raise money. A very real distraction from the real business of legislating," Statement of Representative Leslie Byrne; and "[Y]ou'd like to be spending your time on legislation – on the floor of the Senate, in committees, with staff, deciding what other projects you want to be involved in. But the end-all and be-all is to have sufficient money to run your campaign. So that which you should be doing doesn't always get the first priority. It becomes very time-consuming, very arduous," Statement of Senator Howard Metzenbaum).

[12] Representative Jim Bacchus explained that he chose not to run for re-election because he would have had to abandon the job he had

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Not only has the quality of representation declined due to the absence of expenditure limits, but so too has the quality of campaigns for elected office. The vast majority of a candidate's time is spent fundraising, as opposed to engaging with constituents, opponents or even ideas.[13] Because they are consumed with fundraising, candidates do not have time during their campaigns to engage the issues or the voters.[14]

The excessive demands of fundraising undermine the integrity of the offices that elected officials hold. Senator Robert Byrd complained that the preoccupation with fundraising so interfered with legislating, that it posed "institutional concern about the integrity of the U.S. Senate" Herbert E. Alexander, FINANCING POLITICS: MONEY,

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"been elected to do in order to raise a million dollars and be a virtual full time candidate." Schram, SPEAKING FREELY 43.

[13] *See* Bob Warner, *Critics Tread on Street/Blast Mayoral Hopeful for Remarks on Fund-Raising*, Philadelphia Daily News, Sept. 24, 1999, at 15 (quoting mayoral candidate as saying that the continued escalation of fundraising has "changed the whole tenor of political campaigns," and that if the incumbent "had less money to spend on 30-second campaign ads, he would be more willing to engage in debates and other joint appearances, giving voters more chances to evaluate the mayoral candidates face to face.").

[14] *See, e.g.*, 133 Cong. Rec. S 7782 (Statement of Senator Fritz Hollings ("In my 1986 reelection campaign, I hardly had time to genuinely stop, look, and listen to the people I was going to represent."); Schram, SPEAKING FREELY, at 40 ("I did raise a lot of money, particularly in my Senate race, and it just drained my time and ability to do anything else. It just crippled my ability to do my job properly in my final term, or to run an effective campaign beyond the fundraising part of it," and "That's just the way it is in politics in general. Other than a few debates and shaking hands, the rest of your time is raising money," Statements of Representative Mel Levine); Jim Tankersley, *Senate Hopefuls Focus on Money; Campaigns Need Cash to Reach Voters Before the Primaries*, Rocky Mountain News, June 11, 2004, at 24A (describing statements by former Representative Robert Schaffer that he was spending "120 percent" of his time fundraising in the Republican primary for Senate).

ELECTIONS AND POLITICAL REFORM 4, 51 (1992). Former Senator Dennis De Concini said: "I felt like I was cheating, that I was not putting in a full day's work for what I was really elected to do. I was not elected to come back here and raise money for my next election. And that always has bothered me from the standpoint of what I think the people elected me to do." Schram, SPEAKING FREELY 40.[15]

The current presidential election cycle provides a compelling example of the negative effects of unlimited spending. The two major party nominees, both current office holders, decided to forego the public financing available in the primaries.[16] Instead, President Bush and Senator Kerry have been raising money at a pace of at least one million dollars per day, every day, while they were also serving as federal office holders. The number of hours they spent raising these vast sums is time lost to the American people. *Amici* submit that their time, and that of all elected officials, is a compelling interest worth protecting.

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[15] *See also* Schram, SPEAKING FREELY 40 ("[P]eople would be genuinely unhappy about how much time members have to spend on fund-raising. Portions of every day are spent dialing for dollars," statement of Rep. Dennis Eckhart).

[16] President Bush raised massive sums even though he had no primary opponent.

II. TIME PROTECTION IS A COMPELLING GOVERNMENT INTEREST THAT JUSTIFIES CAMPAIGN EXPENDITURE LIMITS PURSUANT TO BUCKLEY V. VALEO.

A. Because Fundraising Distracts Elected Officials From Their Sworn Duties, Campaign Expenditure Limits Are Vital to Our System of Representative Democracy.

As discussed above, fundraising takes elected officials away from their core duties. This in turn undermines our system of representative democracy. Campaign expenditure limits thus serve the vital interest of protecting our system from the demands that fundraising places on the time of our elected officials.

The American Republic is founded on the notion of elected representatives serving the people. As James Madison wrote in Federalist 39, "we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior." THE FEDERALIST NO. 39 (James Madison). The Framers put these assurances of representative government in the Constitution itself. *See* U.S. CONST. art. I; U.S. CONST. Amend. XVII; U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government."). The Constitution also carefully enshrines the mechanism of democracy, emphasizing the fundamental importance of representative democracy to our system of government.[17]

[17] *See* U.S. CONST. Amend. XV (protecting the vote for emancipated slaves), U.S. CONST. Amend. XIX (protecting the vote for women), U.S.

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This Court's jurisprudence has likewise stressed the importance of protecting the mechanisms and principles of representative democracy. *See, e.g., Gray v. Sanders*, 372 U.S. 368 (1963); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *WMCA v. Lomenzo*, 377 U.S. 633 (1964); *Lucas v. Forty-Fourth General Assembly of the State of Colorado*, 377 U.S. 713 (1964).

Moreover, the Constitution also directly protects the core functions of legislators. Thus, the Constitution's Speech or Debate Clause protects the right of legislators to be free from interference with debating, voting, and actions taken in pursuit of these lawful functions. U.S. CONST. art. I, § 6, cl. 1; *see also Gravel v. United States*, 408 U.S. 606, 616 (1972) (holding that the Speech or Debate Clause is designed to assure the Congress "wide freedom of speech, debate and deliberation,"); *Bond v. Floyd*, 385 U.S. 116, 136-37 (1966) (holding in a First Amendment case that the right of constituents to be "represented in governmental debates by the person they had elected to represent them" is an interest of the highest magnitude).

As set forth above, every hour spent by an elected official making fundraising calls is an hour lost to these representative and legislative functions. These hours represent time that could be spent communicating with constituents, studying legislation, or otherwise fulfilling core legislative functions as enshrined in the Constitution. As Professor Vince Blasi has argued, "Legislators and aspirants for legislative office who devote themselves to

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CONST. Amend. XXIV (abolishing the poll tax), U.S. CONST. Amend. XXVI (extending right to vote to eighteen-year-olds).

raising money round-the-clock are not in essence representatives." Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising,* 94 COLUM. L. REV. 1281, 1283 (1994). When devoting their time to fundraising, legislators are not engaging in the core functions of speech or debate: voting, deliberating, and debating or negotiating with fellow representatives.

In sum, the time that candidates and office holders spend fundraising takes them away from duties that constitute the core of our system of representative democracy. Because elected representatives are at the heart of the American republic, the government has a compelling interest in protecting their time in service of the people.

B. Protecting the Integrity of Our System of Representative Democracy is a Compelling Government Interest.

Enabling candidates and office holders to spend less time fundraising and more time performing their duties as representatives and interacting with voters is a compelling government interest pursuant to *Buckley v. Valeo.*

In *Buckley* this Court held that laws that restrict campaign contributions or expenditures must meet exacting scrutiny. The Court held that the portion of the Federal Elections Campaign Act which limited campaign expenditures was not supported by a compelling government interest and hence violated the First Amendment. By contrast, the Court found that individual campaign contributions survived strict scrutiny on the grounds that: "[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office

holders, *the integrity of our system of representative democracy is undermined.*" *Buckley*, 424 U.S. at 26-27 (emphasis added). The need to protect our system of representative democracy from the appearance or reality of corruption thus provided a compelling government interest for regulating political speech. *See also McConnell v. Federal Election Commission*, 540 U.S. 93, ___, 124 S.Ct. 619, 660-61 (2003) (extending this rationale to justify limits on soft money contributions). This is precisely the interest served by protecting the time of legislators in the service of their core legislative functions. Just as our system of representative democracy is undermined by corruption or the appearance of corruption, so too is our system of representative democracy undermined when legislators tend to fundraising at the expense of their core legislative functions.

Similarly, the Court has repeatedly held that protecting the integrity of the electoral process is a compelling government interest. For example, in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Court held, "Preserving the integrity of the electoral process . . . and 'sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance." *Id.* at 788-89. *See also Burson v. Freeman*, 504 U.S. 191 (1992) (compelling interest in preventing voter intimidation and election fraud); *Am. Party of Tex. v. White*, 415 U.S. 767, 782 n. 14 (1974) (preservation of the integrity of the electoral process and avoiding voter confusion is compelling); *Storer v. Brow*, 415 U.S. 724, 736 (1974) (state may act to protect compelling "interest in the stability of its political system"). As set forth above, the inordinate demands of fundraising have undermined the quality of campaigns

and the electoral process in the same manner that they have undermined the quality of representation. Fundraising takes the place of debating the issues and meeting with constituents.

Buckley and the Court's jurisprudence allow that a compelling government interest could be presented that would justify campaign expenditure limits in light of the interest in preserving the integrity of our system of representative democracy. Justice Kennedy noted that such an interest could be demonstrated in light of the post-*Buckley* spending frenzy: "For now, however, I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting office holders to concentrate their time and efforts on official duties rather than on fundraising." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 409 (2000) (Kennedy, J., dissenting).[18] Similarly, Justice Breyer, in an opinion

[18] The Second Circuit has observed that, "after *Buckley*, there remains the possibility that a legislature could identify a sufficiently strong interest, and develop a supporting record, such that some expenditure limits could survive constitutional review." *Landell v. Sorell*, 2004 WL 1837394, *12 (2004). Likewise, a concurrence in the Sixth Circuit shares this perspective: "It may be possible to develop a factual record to establish that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties, or the interest in preserving faith in our democracy, is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest." *Kruse v. Cincinnati*, 142 F.3d 907, 920 (6th Cir.), *cert. denied*, 575 U.S. 1001 (1998) (Cohn, D.J., concurring). In the instant case, Judge Tymkovich's opinion viewed *Buckley* as an absolute bar to spending limits regardless of the factual circumstances and legal interests supporting the limits. *Homans v. City of Albuquerque and Rue v. City of Albuquerque*, 366 F. 3d 900, 914 (10th. Cir. 2004) (Tymkovich, J., affirming, concurring in part and concurring in the result). But Judge Lucero opined to the contrary, arguing that *Buckley* did not

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joined by Justice Ginsburg, argued that, particularly in light of post-*Buckley* developments, legislatures could find compelling reasons to enact campaign finance reform laws, so as to "protect the integrity of the electoral process." *Id.* at 403-04 (Breyer, J., concurring).

C. Albuquerque's Campaign Limits Directly Serve This Compelling Interest.

The record in the instant case demonstrates that Albuquerque's campaign expenditure limits serve the compelling government interest of protecting the integrity of our system of representative democracy.

With limits on campaign spending, Albuquerque's elected officials were able to devote the greatest part of their attention to the people's business. Without limits, fundraising has become an overwhelming pursuit. As Jim Baca, then-Mayor of Albuquerque, said, "As a result of this new money chase in this year's mayoral election in Albuquerque, I am now forced to spend three hours every day making fundraising phone calls. I have never before had to do this in my political career." *Homans*, 366 F. 3d 900, 912 (3d Cir. 2004). Because of the demands of fundraising for the purposes of re-election, the mayor's time was taken away from the people's business.

The City of Albuquerque has enacted sensible limits on campaign expenditures, protecting the time of elected officials and, consequently, "the integrity of our system of

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address the time protection rationale that is being urged here. *Id.* at 911. The Court should grant this petition in order to resolve this clear split among the circuits.

representative democracy." *Buckley*, 424 U.S. at 26-27.[19] The Albuquerque law at issue is thus an example of the myriad efforts that States and localities have taken to enact meaningful campaign reform that *amici* have long admired.[20] To the extent that the States are laboratories of democracy,[21] *amici* submit that this Court should clarify that experimentation like that undertaken by the City of Albuquerque is not per se banned by *Buckley*.

The limits adopted by the City of Albuquerque are supported by a compelling government interest. As in Albuquerque, without spending limits elected officials at all levels spend excessive amounts of time fundraising. The time spent fundraising undermines both the performance of their core functions – debating, voting, negotiating,

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[19] One author has observed,

> It is clear that states have been activists in the area of campaign finance regulation. And while some common approaches and trends can be identified, it is also apparent that the varying political cultures in each state give rise to different solutions. What is deemed a problem in one state is often disregarded in another. . . . [E]ach state is its own laboratory for reform.

Ronald Michaelson, "Trends in Campaign Financing," *The Book of States*, Vol. 35, p. 275 (2003).

[20] *See, e.g.*, 142 Cong. Rec. S 377 (daily ed. Jan. 25, 1996) (Statement of Senator Bill Bradley) ("I consider those State activists my partners in this reform proposal, and I believe they deserve to have a proposal on the table in Washington that is as radical, as serious, and as real as what people are talking about in the States.").

[21] "Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas. This state innovation is no judicial myth." *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 788 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part) (citations omitted); *see also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

and meeting with constituents – and the quality of campaigns. Protecting the integrity of elected office and of our system of representative democracy, both in the performance of elected officials and in the conduct of campaigns, is an interest of the highest order, enshrined in both the Constitution and this Court's jurisprudence. As such, protecting the time of elected officials from the excessive demands of fundraising provides a compelling government interest which supports campaign expenditure limits. Accordingly, the Court should grant this petition for writ of certiorari in order to resolve this important federal question, in light of conflicting lower court decisions, and to permit cities and States to continue to enact such reform in the service of our core democratic principles.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

MARK C. ALEXANDER
SETON HALL UNIVERSITY
SCHOOL OF LAW
One Newark Center
Newark, New Jersey 07102
(973) 642-8523

JOHN J. GIBBONS
LAWRENCE S. LUSTBERG
MEGAN E. LEWIS
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE, P.C.
One Riverfront Plaza
Newark, New Jersey 07102
(973) 596-4500

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In The

Supreme Court Of The United States

THE CITY OF ALBUQUERQUE,
a municipal corporation, et al.,

Petitioners

v.

RICK HOMANS and SANDER RUE,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE STATES OF CONNECTICUT, ARIZONA, COLORADO, IOWA, KENTUCKY, MARYLAND, MINNESOTA, NEW MEXICO, OKLAHOMA, VERMONT AND WISCONSIN, AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

* RICHARD BLUMENTHAL
ATTORNEY GENERAL
OF CONNECTICUT

Gregory T. D'Auria
Associate Attorney General
Jane R. Rosenberg
Assistant Attorney General
Office of the Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
(860) 808-5020

* *Counsel of Record*
(Additional counsel on inside cover)

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66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

TERRY GODDARD
Attorney General of
Arizona
1275 West Washington
Phoeniz, AZ 85007

KEN SALAZAR
Attorney General of
Colorado
1525 Sherman St., 7th Fl.
Denver, CO 80203

THOMAS J. MILLER
Attorney General of Iowa
Hoover Building, 2d Floor
1305 E. Walnut
Des Moines, IA 50319

GREGORY D. STUMBO
Attorney General of
Kentucky
State Capitol, Suite 118
Frankfort, KY 40601

J. JOSEPH CURRAN, JR
Attorney General of
Maryland
200 St. Paul Place
Baltimore, MD 21202

MIKE HATCH
Attorney General of
Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther
King, Jr. Blvd.
St. Paul, MN 55155

PATRICIA A. MADRID
Attorney General of
New Mexico
P.O. Drawer 1508
Sante Fe, NM 87504-1508

W.A. DREW EDMONDSON
Attorney General of
Oklahoma
2300 N. Lincoln Blvd.,
Suite 112
Oklahoma City, OK 73105

WILLIAM H. SORRELL
Attorney General of
Vermont
109 State Street
Montpelier, VT 05609

PEGGY A. LAUTENSCHLAGER
Attorney General of
Wisconsin
114 East State Capitol
Madison, WI 53707

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INTEREST OF THE AMICI CURIAE

The amici curiae State of Connecticut and the States identified on the cover (the "Amici States"), by and through their attorneys general, respectfully submit this brief in support of the City of Albuquerque's Petition for a Writ of Certiorari.

The Amici States have a vital interest in this case because it will directly impact their ability to enact their own campaign finance reforms. Since 1976, when this Court struck down candidates' campaign spending limits in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Amici States have seen an astronomical increase in campaign spending by political candidates that has fueled a generally held perception that money buys power. They have further found that the intense pressure to raise funds negatively impacts the time that elected officeholders have available to serve the public and that, for an increasing number of their citizens, running for office is a financial impossibility.

To combat these extremely serious problems, which threaten to undermine the foundation of our democracy and have no easy solution, the Amici States, like the City of Albuquerque, have enacted, or would like to enact, a wide variety of campaign finance reforms, including reforms that limit candidate expenditures. As the "laboratories of democracy," the States' experimentation in this regard is crucial if viable solutions to this national crisis are ultimately to be found.

The States' ability to experiment with reform is jeopardized, however, by the cloud of uncertainty that has been created by the conflict between the Tenth Circuit's ruling in this case, which effectively held that *Buckley v. Valeo*, 424 U.S. 1 (1976), imposed a *per se* ban on campaign expenditure limits, and the Second Circuit's ruling in *Landell v. Sorrell*, No. 00-9159(L), 2004 WL 1837394 (2d Cir., Aug. 18, 2004), which reached precisely

the opposite conclusion. Because the resulting uncertainty over the constitutionality of any campaign finance reform measure involving expenditure limitations, if not resolved, will effectively foreclose all state reform involving such limitations and chill state campaign finance reform efforts in general, the Amici States respectfully urge this Court to grant the City's petition for a writ of certiorari in order to clarify this area of the law, reverse the Tenth Circuit's ruling, and permit the States to experiment with much-needed campaign finance reform.

REASON FOR GRANTING THE WRIT

THE UNCERTAINTY CREATED BY THE TENTH CIRCUIT'S RULING, IF NOT RESOLVED, WILL LIMIT THE STATES' ABILITY TO EXPERIMENT WITH CAMPAIGN FINANCE REFORM MEASURES INVOLVING EXPENDITURE LIMITATIONS AND THEREBY UNDERMINE THE STATES' VITAL ROLE AS THE "LABORATORIES OF DEMOCRACY."

As this Court has long recognized, the States are the "laboratories of democracy." *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)(Brandeis, J., dissenting); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980); *Arizona v. Evans*, 514 U.S. 1, 8 (1995). "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)(Brandeis, J., dissenting).

One area in which such experimentation is not only valuable, but essential, is in the area of campaign finance reform, in which the same deep-seated problems identified by the City of Albuquerque threaten the integrity of the democratic process at all levels of government nationwide.

By experimenting with campaign finance reform, the States advance their own vital interest in structuring their own political processes at the State level while, at the same time, providing information that is crucial to resolving the federal campaign finance crisis that plagues the nation as a whole. Although the States, to date, have actively experimented with campaign finance reform, the uncertainty created by the conflict between the Tenth and the Second Circuits concerning the constitutionality of expenditure limitations threatens the continued vitality of these crucial state reform efforts.

A. The Compelling Interests Cited By The City Of Albuquerque In Defense Of Its Charter Provision Limiting Campaign Expenditures Are Interests Shared By States Nationwide.

Three compelling governmental interests motivated the City of Albuquerque to enact its city charter provision limiting campaign expenditures in municipal elections: (1) deterrence of actual or perceived corruption and enhancement of public confidence in the electoral process; (2) preservation of officeholders' ability to perform their duties without devoting excessive time to fundraising; and (3) encouragement of electoral competition. *Homans v. City of Albuquerque*, 366 F.3d 900, 907 (10th Cir. 2004). These interests are by no means unique to Albuquerque. On the contrary, they are interests shared by virtually every State in the country.

Like Albuquerque, the States have a compelling governmental interest in preventing corruption and the appearance of corruption in the electoral process. In Vermont, for example, the state legislature has found that "[l]arge contributions and large expenditures by persons or committees . . . reduce public confidence in the electoral process and increase the appearance that candidates and elected officials will not act in the best interests of Vermont citizens." 1997 Vt. Laws Pub. Act 64 (H. 28)(finding 9).

Citing evidence that "[e]ven with contribution limits, the arms race mentality has made candidates beholden to financial constituencies that contribute to them, and candidates must give them special attention *because* the contributors will pay for their campaigns," *Landell v. Sorrell*, 2004 WL 1837394 at * 21 (2d Cir., Aug. 18, 2004), the Second Circuit has concluded that "Vermont has a compelling interest in safeguarding its political process from such contributor dominance, because it corrupts the process for achieving accessibility and accountability of state officials and candidates." *Id.*

The same is true of all States. *See, e.g.*, Colo. Const. Art. XXVIII, § 1 (2003). As this Court has emphasized, "the avoidance of the appearance of improper influence is . . . critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Buckley*, 424 U.S. at 27 (internal quotation marks omitted).

The States also have a compelling interest in curbing the staggering cost of campaigning in order to allow officeholders to spend less time fundraising and more time performing their official duties. *See Landell v. Sorrell*, 2004 WL 1837394 at *26 (2d Cir., Aug. 18, 2004); *Rosenstiel v. Rodriquez*, 101 F.3d 1544,1553 (8th Cir.1996), *cert. denied*, 520 U.S. 1229 (1997); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993). As one Senator has observed, "all too often [legislators] become fund-raisers first, and legislators second." 138 Cong. Rec. § 115 (daily ed. Jan. 6,1987)(statement of Sen. Byrd). The result is that legislators have little time to focus on their constituents' needs and what time they do have is often devoted to those who contribute the most. *Landell,* at *24-25.

The third interest cited by Albuquerque – the promotion of electoral competition – is likewise shared by the States. Across the country, incumbent candidates generally have far more access to campaign funds than their challengers and have enormous financial war chests

that discourage new faces from even attempting to run for office. In effect, running for office has become a financial impossibility for most Americans. *See* 1997 Vt. Laws Pub. Act 64 (H. 28)(finding 1); Colo. Const. Art. XXVIII, § 1 (2003); Adam Lioz, U.S. PIRG Education Fund Report, "The Role of Money in the 2002 Congressional Elections," (June, 2003).

Correcting these problems is of critical importance to the States. As a national survey has revealed, a majority of Americans are dissatisfied with the state of our political system and cite the role of money in politics as one of the primary sources of their discontent. Center for Responsive Politics, "A National Survey of the Public's Views on How Money Impacts our Political System," conducted by the Princeton Survey Research Associates (June, 1997)(available at www.opensecrets.org/pubs/survey/htm). Succinctly summing up the situation, one scholar has observed that the inordinate role that wealth plays in American politics is the "most pressing threat to American democracy today." S. Loffredo, "Poverty, Democracy and Constitutional Law," 141 U. Pa. L. Rev. 1277, 1279 (1993).

B. The Problems That Undermine The Current Campaign Finance System Have Been The Catalysts For A Wide Range Of State Campaign Finance Reform Efforts.

In response to the deep-seated problems plaguing the current system of campaign financing, the States have experimented with a wide range of reforms.

Vermont's legislature has adopted a comprehensive finance reform act that incorporates candidate expenditure limitations akin to those at issue in the present case, in addition to varied limits on in-state and out-of-state contributions, disclosure provisions governing political advertisements, and mandatory expenditure reporting requirements. *See* 1997 Vermont Campaign Finance

Reform Act ("Act 64"), codified at Vt. Stat. Ann. tit. 17, chap. 59 §§ 2801 – 2883.

Other States have tried myriad other reforms. For example, some States, such a Missouri, Oregon, Montana and the District of Columbia, have experimented with restricting campaign contributions to small amounts ranging from $100 to $250.

Other States have tried to limit the source of contributions. For example, Alaska tried capping the contributions that candidates for statewide office could receive from out-of-state contributors. *See* Alaska Senate Bill 191 (1996); *State v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999), *cert. denied*, 528 U.S. 1153 (2000). In Oregon, the legislature passed a state constitutional amendment that prohibited candidates from state office from raising more than 10% of their campaign funds from contributors outside the candidate's electoral district. *See* Oregon 1994 Ballot Measure 6; *Vannatta v. Keisling*, 151 F.3d 1215 (9th Cir.1998), *cert. denied*, 525 U.S. 1104 (1999); *see also Landell* at *47-49..

Still other States have sought to ban certain contributions altogether. For example, Colorado amended its state constitution in 2002 to ban corporate and union contributions to candidates and political parties, in addition to imposing contribution limits and voluntary spending limits. *See* Colo. Const. Art. XXVIII.

In several States, including Maine and Arizona, the legislatures have experimented with public financing. In Maine, for example, a candidate may receive public campaign financing provided he foregoes any private contributions, including self-financing, and limits his spending to the amount provided by the fund. Me. Rev. Stat. Ann., Title 21-A, Chapter 14. If a candidate who runs such a "clean" campaign is out-spent by a non-participating opponent, the State matches the excess expenditures one-for-one. *Id.*

The significance of these reforms is their variety. While not all of them have withstood legal challenges, they each represent a creative approach to the problem. As one commentator has observed:

> It is clear that states have been activists in the area of campaign finance regulation. And while some common approaches and trends can be identified, it is also apparent that the varying political cultures in each state give rise to different solutions. What is deemed a problem in one state is often disregarded in another. . . . [E]ach state is its own laboratory for reform.

Ronald Michaelson, "Trends in Campaign Financing," *The Book of States*, Vol. 35, p. 275 (2003).

The advantages of such a situation are obvious. The States are able to experiment with unique reform measures that address their own particular needs and allow them to freely structure their own political processes. At the same time, such experimentation provides a valuable model for reform for other States and municipalities and, most importantly, for the federal government, which is itself struggling to address an enormous campaign finance problem in presidential and congressional elections nationwide. Clearly, the entire country benefits from the wealth of information generated by this scheme. As Justice Brandeis wisely warned, "[d]enial of the right to experiment may be fraught with serious consequences to the nation." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)(Brandeis, J., dissenting).

C. Reform Efforts To Date Have Not Solved The Problems That Undermine The Current Campaign Finance System.

Despite the myriad state reform efforts to date, the problems plaguing the current campaign finance system

have not been solved. It has become increasingly clear that contribution limitations alone are not the answer and that further experimentation with additional measures, including expenditure limitations, is crucial.

In 1997, Vermont adopted expenditure limitations as part of its comprehensive campaign finance reform Act because it was evident to the legislature that unbridled campaign expenditures were forcing candidates to spend too much time fundraising, causing candidates to give preferred status to contributors over non-contributors, and hindering the robust debate of issues. *Landell* at *5. In particular, the legislature concluded that contribution limits alone, without expenditure limits, exacerbated the time problem because candidates were forced to spend more time collecting smaller contributions from a greater number of donors than would be the case with no contribution limits at all. *Landell* at *25. Contribution limits *coupled with expenditure limits*, however, meant that candidates simply did not have to spend as much time and energy raising money. *Id.*

In addition to addressing the time problem, expenditure limitations have the potential to prevent candidates from pouring unlimited amounts of money into advertising instead of communicating with voters through arguably more meaningful ways, such as through debates and speeches. As one study has pointed out, "[a]ll too often, frontrunners will simply refuse to debate [their] opponent[s], preferring instead to raise campaign funds and buy commercials." Derek Cressman, U.S. PIRG Education Fund Report, "Lone Star Election Laws," § II (July, 2000)(available at http://prig.org/democracy/democracy.asp?id2=5977&id3=CFR&). In such a situation, underdog candidates, who are at a disadvantage financially, "are unable to compete as effectively as they could in debates which put all candidates on more equal footing." *Id.*

Expenditure limitations also may be used to prevent millionaire candidates from using their own resources to vastly outspend opponents who are relying on small contributions. Derek Cressman, U.S. PIRG Education Fund Report, "Lone Star Election Laws," § II (July, 2000) (available at http://prig.org/democracy/democracy.asp?id2=5977&id3=CFR&). As noted above, "millionaire candidates distort the electoral process and make it considerably more difficult for ordinary citizens to run for office because the level of funds needed to compete with millionaires is beyond the reach of most candidates." *Id.* § II.

Given the potential for expenditure limitations to be valuable tools in controlling the influence of money in electoral campaigns not only at the municipal level, as in Albuquerque, but also at the state and federal level, further experimentation is vital. Only by allowing the States to explore freely and fully the possibilities of expenditure limitations will it be possible to determine whether, and to what extent, such limitations hold the key to solving the enormous campaign finance problem that is plaguing the nation's current electoral system.

D. The Conflict Between The Tenth And The Second Circuit, If Not Resolved, Will Jeopardize The States' Ability To Experiment With Reform And Fulfill Their Crucial Role As The Laboratories Of Democracy.

The Tenth Circuit's erroneous conclusion -- that all limitations on candidate expenditures are *per se* unconstitutional under *Buckley* and that none of the three governmental interests advanced by Albuquerque could ever provide a sufficiently compelling governmental interest to support expenditure limits -- threatens the States' continued experimentation with campaign finance reform in two significant ways.

First, it effectively forecloses the ability of the States to adopt reforms that include limitations on campaign expenditures. Although the Second Circuit concluded in *Landell* that *Buckley* did not constitute a *per se* ban on expenditure limitations, the uncertainty created by the conflict between the Tenth and the Second Circuits on the issue will be sufficient to deter many legislatures, even those in the Second Circuit, from gambling on the constitutionality of legislation that includes expenditure limitations. Given the time, effort, and compromise that is necessary to enact campaign finance reform, legislators may eschew pushing for reforms of questionable constitutionality.

Second, the conflict between the Tenth and Second Circuits' rulings creates uncertainty as to whether the States' interests in preventing corruption and the appearance of corruption, protecting the time of officeholders and candidates from the burdens of fundraising, and fostering electoral competition are "compelling." By holding, in contrast to the Second Circuit, that each of these three interests is "constitutionally incapable of justifying spending restrictions as a matter of law," *Homans v. City of Albuquerque*, 366 F.3d 900, 915 (10th Cir. 2004), and that the latter two interests are "neither new nor compelling," *id.* at 914, the Tenth Circuit indirectly raises uncertainty as to whether these interests would be adequate to justify other, as yet untested, types of reforms. Because, as noted above, uncertainty regarding an act's constitutionality renders it far less likely to be enacted, the Tenth Circuit's ruling will potentially have a chilling effect on new reforms that are based on the same compelling interests that were deemed constitutionally inadequate in the present case.

To avoid this situation, and ensure that the States are not foreclosed from vital experimentation based on a wholly erroneous interpretation of *Buckley*, it is essential

that this Court grant the Petition to review the Tenth Circuit's ruling in this case and clarify this important area of the law.

CONCLUSION

For all of the foregoing reasons, the Amici States respectfully request that the Court grant the City of Albuquerque's Petition for a Writ of Certiorari.

Respectfully submitted,

*RICHARD BLUMENTHAL
Attorney General of Connecticut

GREGORY T. D'AURIA
Associate Attorney General

JANE ROSENBERG
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Tel. No. (860) 808-5020

*Counsel of Record

(9)

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THE CITY OF ALBUQUERQUE,
a municipal corporation, *et al.*,
Petitioners,

v.

RICK HOMANS and SANDER RUE,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF *AMICUS CURIAE* OF CURRENT AND FORMER STATE COURT JUSTICES AND JUDGES IN SUPPORT OF PETITIONERS

DEBORAH GOLDBERG
Counsel of Record
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York NY 10013
(212) 998–6730

Counsel for Amici Curiae

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With the consent of the parties, *Amici Curiae* hereby submit their brief in support of the petition for a writ of certiorari in this case.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici Curiae are current and former state court justices and judges, who are deeply concerned about the growing influence of special interest money on judicial campaigns.[2] Many of the *Amici* have personal experience as candidates in judicial elections, and all of them deplore the disturbing trends described in this brief. *Amici* do not necessarily support spending limits in any particular campaigns for the bench, but they believe that states should have the option to consider such limits as a narrowly tailored response to imminent threats to the real and perceived impartiality and

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[1] Letters of consent from counsel for all parties have been filed with the Clerk of this Court. No party's counsel authored any part of this brief. No person or entity other than *Amici* and their counsel contributed monetarily to preparing or submitting the brief.

[2] *Amici curiae* are former Chief Justices of state high courts: Hon. James G. Exum, Jr. (North Carolina Supreme Court, 1986-1994), Hon. Richard P. Guy (Washington Supreme Court, 1999-2001), Hon. William C. Hastings (Nebraska Supreme Court, 1987-1995), Hon. Conrad L. Mallett, Jr. (Michigan Supreme Court, 1997-1998); Hon. Vincent L. McKusick (Maine Supreme Judicial Court 1977-1992), Hon. Robert A. Miller (South Dakota Supreme Court, 1990-2001), Hon. Thomas A. Zlaket (Arizona Supreme Court, 1997-2000); former and current Associate Justices and Associate Judges of state high courts: Hon. Andy Douglas (Ohio Supreme Court, 1985-2002), Hon. Stewart F. Hancock (New York Court of Appeals, 1986-1993), Hon. Howard A. Levine (New York Court of Appeals, 1993-2002), Hon. David Newbern (Arkansas Supreme Court, 1985-1998), Hon. Alice Resnick (Ohio Supreme Court, 1989-present), Hon. Cruz Reynoso (California Supreme Court, 1982-1987); and former Justices and Judges of intermediate appellate and trial courts: Hon. Murry Cohen (Court of Appeals for the First District of Texas, 1983-2002), Hon. Donald J. Horowitz (Superior Court of Washington for King County, 1973-1977).

independence of the judiciary. *Amici* recognize that the instant case does not pertain directly to campaigns for the bench. But in the instant case, and in the leading case on judicial campaign expenditure ceilings, *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), has been read as an absolute bar to such limits. *Amici* therefore urge this Court to grant the petition to resolve whether that interpretation is correct and, if it is, to reconsider *Buckley*.

SUMMARY OF ARGUMENT

The constitutionality of spending limits in judicial elections has never been considered by this Court. When *Buckley* was decided, campaigns for the bench were inexpensive, uncontentious, and largely unnoticed. There was no call for expenditure ceilings under the circumstances of those campaigns, and there was no reason for the *Buckley* Court to decide whether such caps could survive constitutional scrutiny.

But judicial elections have changed substantially since the 1970s. Several states have seen million-dollar campaigns for their Supreme Courts, and an arms-race mentality is growing, as candidates build ever-larger war chests in the search for electoral success. Without spending limits to reduce the demand for private contributions, candidates increasingly must solicit funds from wealthy special interests on either side of the issues likely to come before the court. The highly visible infusions of unlimited special interest money into the coffers of judicial candidates leaves the public wondering whether justice is for sale.

To date, courts have not been willing to consider the changed circumstances of modern campaigns for the bench, which were not and could not be considered in *Buckley*, when reviewing the constitutionality of spending limits in judicial campaigns. Their refusal is grounded on the same premise

that supports the Tenth Circuit decision in this case—that *Buckley* represents an absolute bar to spending limits no matter what the circumstances. With judicial elections rapidly deteriorating—and, with them, public confidence in the courts—the petition in this case should be granted to clarify whether that interpretation is correct and, if so, to reconsider *Buckley*. See Point I.

The petition should also be granted to resolve whether interests not considered in *Buckley* might justify spending limits in judicial elections. At least three distinct interests—in the impartiality of the judiciary, in its independence, and in the appearance of impartiality and independence—are potentially compelling enough to support such limits. At this critical juncture, when all three interests are in serious jeopardy, this Court should take the opportunity to consider whether *Buckley* permits consideration of new rationales for spending limits, and if it does not, to reconsider *Buckley*. See Point II.

ARGUMENT

I. The Changes in Judicial Campaigns Since the Decision in *Buckley* Are Grounds for Reconsideration of the Circumstances Under Which Spending Limits Might Be Constitutional.

In recent years, studies have documented the increasing demand for large sums of money to support candidacies for the bench in states with elective judiciaries. Because the contributions come principally from parties and attorneys who appear in court, the public concludes that the contributors are intending to influence, and do influence, decision-making on the bench. Because these developments post-dated the decision in *Buckley*, and because Congress did not presume to regulate judicial elections in the Federal Election Campaign Act, the *Buckley* Court.did not consider

the constitutionality of spending limits in campaigns for the bench. This Court should grant the petition for a writ of certiorari in this case to clarify whether *Buckley* bars such limits in all elections and, if it does, to reconsider *Buckley*.

A. Judicial Campaigns Have Materially Changed for the Worse Since *Buckley*.

It is no secret that "campaigning for a judicial post today can require substantial funds." *Republican Party of Minnesota v. White*, 536 U.S. 765, 789 (2002) (O'Connor, J., concurring). Fundraising by state Supreme Court candidates jumped from $28,291,950 in 1998 to $45,636,059 in 2000, an increase of 61 percent in just one election cycle. Deborah Goldberg, Craig Holman & Samantha Sanchez, *The New Politics of Judicial Elections* 7 (Justice at Stake 2002), *at* http://www.justiceatstake.org/files/JASMoneyReport.pdf [hereinafter *New Politics 2000*]. "That increase was no 'sport,' but a new peak in a clear, dramatic trend whether viewed in terms of total dollars, or dollars-per-seat, or percentages." Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. Rev. Mich. St. U.-Detroit C.L. 849, 862. In 2002, the four general election candidates for two Ohio Supreme Court seats raised a total of $6,241,583, and none raised less than $1,193,732. Deborah Goldberg & Samantha Sanchez, *The New Politics of Judicial Elections 2002* 15 (Justice at Stake 2004), *at* http://faircourts.org/files/NewPoliticsReport2002.pdf [hereinafter *New Politics 2002*]. With almost a month still to go until the 2004 election, three Ohio Supreme Court candidates had war chests of more than $1 million. Justice at Stake, 2004 State Supreme Court Elections Monitoring Project, *at* http://justiceatstake.org/contentViewer.asp?breadcrumb=4,126,103,475 (reporting fundraising through Oct. 5, 2004).

The high and unquestionably growing demand for funds is in part the result of changes in the way campaigns are run. In 2000, Supreme Court candidates ran television ad campaigns in only four states. *New Politics 2000*, at 13. Two years later, the number of states seeing television commercials financed by Supreme Court candidates rose by 75 percent. *New Politics 2002*, at 8. As of October 10 this year, candidates for their state's highest court bought television airtime in 12 states, tripling the number of states in just four years. Brennan Center for Justice, *Buying Time 2004: Television Advertising in the 2004 Supreme Court Elections*, *at* http://www.brennancenter.org/programs/buyingtime_2004/storyboard_2004_index.html. The high cost of airtime forces judicial candidates to raise large sums from parties interested in influencing judicial decision-making. *See* Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 Cap. U. L. Rev. 455, 474 (2002) ("The expensiveness of media campaigns has the dramatic effect of forcing not only judicial candidates but sitting judges hoping for re-election to seek and accumulate large campaign war chests.") [hereinafter *Independence and Democratic Accountability*].

Studies show that most of the money financing Supreme Court campaigns is raised from persons and entities who regularly appear in court. *See id.* ("Often, lawyers or litigants who are likely to appear before the judge constitute large proportions of the contributions to judicial candidates."). From 1989 through 2000, nearly half of all contributions to Supreme Court candidates came from attorneys and business. *New Politics 2000* at 9. In 2002, two thirds came from those sources. *New Politics 2002* at 18.

> The result can be an unhealthy dependence between judicial candidates and interest groups where interest groups back judicial candidates to secure their political agendas and candidates rely on

> interest group backing to achieve an to retain judicial office.

Anthony Champagne, *Interest Groups and Judicial Elections*, 34 Loy. L.A. L. Rev. 1391, 1393 (2001) [hereinafter *Interest Groups*]. That visible dependence prompts complaints that candidates "sully the court's reputation by raising millions of dollars from parties and lawyers who have business before the court." Texans for Public Justice, *Payola Justice* (1998), *at* http://www.tpj.org/docs/1998/02/reports/payola/conclusions.html. Without spending limits, candidates of high integrity are sullied by a campaign finance system that leaves them no choice but to raise as much as they can to ward off defeat or to win a seat.

B. The Unlimited Money Chase in Contemporary Judicial Elections Undermines Public Confidence in the Courts.

The rapid spread of highly visible, expensive campaigns for the bench, financed by groups and individuals with stakes in the outcome of judicial decision-making, is taking a toll on the courts. Survey research has shown that 76 percent of registered voters believe that campaign contributions influence judges' decisions. Greenberg Quinlan Rosner Research & American Viewpoint, National Public Opinion Survey, Frequency Questionnaire at 4 (2001), *at* http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf. Two-thirds of all voters believe that litigants who have made campaign contributions to judges often receive favorable treatment. *See id.* at 7. A similar poll in 1999 found that 81 percent of the public thought that political considerations influence judge's decisions, and 78 percent believed that elected judges are influenced by having to raise campaign funds. *See* National Center for State Courts, *How the Public Views the State Courts: A 1999 National Survey*, *at* http://www.ncsc.dni.us/ptc/ptc.htm. Such statistics do not

surprise the former Chief Justice of the (elected) Texas Supreme Court. He asks: "How can judges convince the public that their only constituency is the law when their tenure in office depends on campaign contributions from lawyers and litigants?" Hon. Thomas R. Phillips, *Electoral Accountability and Judicial Independence*, 64 Ohio St. L.J. 137, 144 (2003) [hereinafter *Electoral Accountability*].

The general public perception is shared, to a lesser but still alarming extent, by individuals with extensive experience in our justice system. Fully 26 percent of state court *judges* agreed that campaign contributions have more than a little influence on decisions. Greenberg Quinlan Rosner Research & American Viewpoint, National Public Opinion Survey, Frequency Questionnaire at 5 (2002), *at* http://faircourts.org/files/JASJudgesSurveyResults.pdf. A 1999 survey of Texas state judges conducted by that state's Supreme Court and its bar association found that nearly half believed contributions had a significant effect on courtroom decisions. Texas Office of Court Administration & State Bar of Texas, *The Courts and the Legal Profession in Texas—The Insider's Perspective: A Survey of Judges, Court Personnel, and Attorneys*, Executive Summary 5 (1999). Anecdotal evidence suggests that lawyers, too, believe that their contributions to judges affect their chances of success in court. David Barnhizer, *"On the Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 Cath. U. L. Rev. 361, 379 (2001) [hereinafter *On the Make*].

Even if trust in government is declining generally, erosion of confidence in the courts is of particular concern. "That is because the authority of 'the least dangerous branch' rests almost entirely on the voluntary compliance with its rulings by the other branches of government and by the public at large." *Electoral Accountability*, at 144. Without public confidence in the fairness and impartiality of our courts, the rule of law is at risk.

C. This Court Should Grant a Writ of Certiorari to Clarify the Application of *Buckley* to Circumstances Not Considered in That Case.

Judicial campaigns were not always contentious and expensive. "The old style of judicial campaign was a low budget affair where the judicial candidate spoke to any group willing to hear a dull speech about improving the judiciary or about judicial qualifications." *Interest Groups*, 34 Loy. L.A. L. Rev. at 1393. The large campaign contributions and scandals of the Watergate years that motivated Congress to enact spending limits in the 1974 amendments to the Federal Election Campaign Act were confined at that time to elections for legislative and executive office. "Judicial campaigns first experienced [soaring spending] in only a few states, starting in the early 1980s." Roy A. Schotland, *Campaign Finance in Judicial Elections*, 34 Loy. L.A. L. Rev. 1489, 1489 (2001). *Buckley* thus did not and could not consider the special threats presented by uncontrolled fundraising in judicial elections when examining the state interests that might justify spending limits.

Notwithstanding this history, courts adjudicating the constitutionality of spending limits in judicial campaigns have interpreted *Buckley* to preclude such caps. *See Suster v. Marshall*, 149 F.3d 523, 529 (6th Cir. 1999), *aff'g*, 951 F. Supp. 693 (N.D. Ohio 1996). According to *Suster*, when considering the constitutionality of expenditure ceilings, "the prevention of corruption is the only interest the Supreme Court has and, hence, this Court will give credence," *id.* at 532, and every other justification must be summarily dismissed "irrespective of the *kind* of position sought," *id.* at 530. But the *White* Court has since declared, "we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." 536 U.S. at 783. This Court should

therefore grant the petition for a writ of certiorari in this case to clarify that *Buckley* does not preclude consideration of the new and unique threats presented by uncontrolled fundraising from special interests in campaigns for the bench or the unique rationales for spending limits in those campaigns. If *Buckley* does represent that absolute bar, the writ should be granted to reconsider *Buckley*.

II. Limits on Spending in Judicial Campaigns Are Supported by Especially Compelling Interests Not Considered in *Buckley*.

Buckley considered and rejected three interests proffered in defense of spending limits in federal campaigns for executive and legislative office. 424 U.S. at 39-59. But "*Buckley*'s rejection of expenditure restrictions for presidential and congressional elections is distinguishable because of the unique nature of the judicial role and the importance of judicial independence." Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 Chi.-Kent l. Rev. 133, 135 (1998) [hereinafter *Preserving an Independent Judiciary*]. In addition to the interest in judicial independence, the interests in judicial impartiality and the appearance of independence and impartiality, *see* J.J. Gass, *After* White*: Defending and Amending the Canons of Judicial Ethics* (Brennan Center for Justice 2004), *at* http://www.brennancenter.org/resources/ji/ji4.pdf (defining the three separate interests) [hereinafter *After* White], also provide grounds for distinguishing *Buckley*. Deborah Goldberg, *Public Funding of Judicial Elections: The Role of Judges and the Rules of Campaign Finance*, 64 Ohio St. L. J. 95, 116-17 (2003) ("[T]he state interests uniquely implicated in [campaigns for the bench] provide a compelling justification for limiting spending by judicial candidates."). Because courts reviewing the constitutionality of spending limits in judicial elections have rejected consideration of any

justifications not explicitly endorsed by the *Buckley* Court, a writ of certiorari should be granted in this case to eliminate any confusion about the nature of the interests that might justify caps on spending in specialized contexts.

A. Courts Should Be Permitted to Consider Whether the Interest in Judicial Impartiality Supports Spending Limits in Campaigns for the Bench.

The mandate for judicial impartiality is implicit in the Due Process Clause of the U.S. Constitution. *See In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). As one court has recently affirmed, "litigants have a right guaranteed under the Due Process Clause to a fair and impartial magistrate and the State, as the steward of the judicial system, has the obligation to create such a forum . . . ." *Raab v. State Comm'n on Judicial Conduct*, 793 N.E.2d 1287, 1290-91 (N.Y. 2003). Although the term "impartiality" may be understood in a variety of ways, *see White*, 536 U.S. at 775-78; Ofer Raban, *Judicial Impartiality and the Regulation of Judicial Election Campaigns*, 15 U. Fla. J.L. & Pub. Pol'y 205, 21-19 (2004) (criticizing *White*'s analysis of impartiality), under one common post-*White* construction, impartiality is a compelling interest that may well support spending limits in judicial campaigns.

Since *White*, courts have recognized that impartiality precludes judges "from binding themselves, or appearing to bind themselves, to take action against particular *kinds* of parties." *After* White at 7 (emphasis added). On this understanding, admitted favoritism toward law enforcement in criminal cases is inconsistent with impartiality. *See Watson v. State Comm'n on Judicial Conduct*, 794 N.E.2d 1, 4-5 (N.Y. 2003); *In re Kinsey*, 852 So. 2d 77, 88-89 (Fla.), *cert. denied*, 124 S. Ct. 180 (2003). Impartiality would also

foreclose a preference for plaintiffs or defendants in tort cases.

But the dynamics of modern judicial elections press candidates for the bench toward precisely this form of bias. The unlimited demand for funds inherent in any campaign finance system without expenditure ceilings forces candidates to accept large sums from well-defined special interests, whether plaintiff-side personal injury lawyers or defense-side corporate lawyers. *Compare Independence and Democratic Accountability* at 474 (describing trial lawyer contributions) *with Preserving an Independent Judiciary* at 137 (describing contributions from corporate defense lawyers). We cannot assume that judges will ignore the prospect of losing that support in the next election if they fail to meet contributors' expectations. To reduce the demand for campaign funds and thereby combat that threat to impartiality, courts should be permitted to consider whether limits on judicial campaign spending are constitutional.

B. Courts Should Be Permitted to Consider Whether the Interest in Judicial Independence Supports Spending Limits in Campaigns for the Bench.

Like "impartiality," judicial "independence" is also susceptible to various interpretations, and the two terms are sometimes used interchangeably. *See White*, 536 U.S. at 775 n.6. But when "independence" is not used merely as a synonym for "impartiality," it speaks to a second value of constitutional significance—the principle of separation of powers. *See Griffen v. Ark. Judicial Discipline & Disability Comm'n*, 130 S.W.3d 524, 532 (Ark. 2003) ("Judicial independence is a hallmark of our system of government, and we cannot abide . . . entanglements between the judicial and other branches of government . . . .").

> An independent judiciary is: (1) not dominated by or dependent on the other two branches of government; (2) not unduly entangled in the political machinery of the other branches . . . ; and (3) not actuated in its decision-making process by the same considerations and interests as the other branches.

After White at 8. At the very least, the third aspect of judicial independence is implicated in the financing of campaigns for the bench.

Judicial campaign finance systems that require candidates to collect unlimited numbers of private contributions give enormous power to wealthy interest groups. The control by those groups over the large sums needed for campaigns carries with it the ability to influence the pool of judicial candidates. Candidates whose commitment to considering each case on its merits is demonstrably paramount will be less likely to attract support than candidates who give priority to political considerations. Increasingly, the distinction between the judiciary and the other branches of government—a distinction that enables courts to serve as a check on executive and legislative power—will be blurred. For this reason, too, courts should be permitted to consider whether limits on judicial campaign spending are constitutional.

C. Courts Should Be Permitted to Consider Whether the Interest in the Appearance of Impartiality and Independence Supports Spending Limits in Campaigns for the Bench.

The interest in the appearance of impartiality and independence is a third and distinct interest that may support spending limits in judicial elections. As this Court has recognized: "The Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do

their very best to weigh the scales of justice equally between the contending parties." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (internal quotation omitted). Appearances count because "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

That reputation has been besmirched by the influence of money in judicial elections. The unlimited fundraising from special interests on both sides of various policy debates has drawn accusations of "capture" and "legalized bribery." *On the Make* at 361, 427. There is a compelling interest in stemming this loss of trust, because "without public confidence the judicial branch could not function." Hon. William H. Rehnquist, *Keynote Address at the Washington College of Law Centennial Celebration*, 46 Am. U.L. Rev. 263, 274 (1996). Combating threats to the appearance of impartiality and independence represents a third compelling interest potentially justifying limits on spending in judicial elections. This Court should grant the petition for a writ of certiorari in this case to clarify that *Buckley* does not preclude consideration of that interest or, if such consideration is barred, to revisit *Buckley*.

CONCLUSION

The changed circumstances of judicial elections over recent years and the distinct interests supporting spending limits in campaigns for the bench argue for allowing states to make the case for caps on judicial spending. As long as the ceilings are high enough to ensure that all candidates can convey their message to voters, due process concerns for the impartiality and independence of the courts—in reality and appearance—should overcome burdens on the candidates' First Amendment rights. But as *Buckley* has been interpreted by the Sixth Circuit in *Suster* and the Tenth Circuit in the

instant case, the door is closed to such arguments. *Amici* understand that this case does not directly concern judicial elections. But *Amici* respectfully request that the Court grant the petition for a writ of certiorari in this case to clarify whether *Buckley* presents an absolute bar to consideration of new facts and new state interests when reviewing the constitutionality of spending limits and, if such consideration is foreclosed, to revisit *Buckley*.

Respectfully submitted,

Deborah Goldberg
Counsel of Record
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
(212) 998–6730

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THE CITY OF ALBUQUERQUE, *ET AL.*, PETITIONERS

V.

RICK HOMANS AND SANDER RUE, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE HONORABLE SENATORS ERNEST F. HOLLINGS, THEODORE F. STEVENS, ROBERT C. BYRD, JOHN F. REED, DIANNE E. FEINSTEIN, CHARLES E. SCHUMER, CHRISTOPHER J. DODD, AND ARLEN SPECTER AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Counsel of Record:

SCOTT N. AUBY
Debevoise & Plimpton LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 383-8053

Of Counsel:

LAYTH ELHASSANI
Legal Counsel to the Hon. Senator Hollings
EMILY S. PIERCE
JOCELYN C. BRAMBLE
Debevoise & Plimpton LLP

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INTEREST OF THE AMICI CURIAE

With the attached written consent of all parties, the Honorable Senators Ernest F. Hollings, Theodore F. Stevens, Robert C. Byrd, John F. Reed, Dianne E. Feinstein, Charles

[1] Per Supreme Court Rule 37.6, no portion of this brief was authored by counsel for any party, and no person or entity other than counsel for the *amici curiae* made any monetary contribution to the preparation or submission of this brief.

E. Schumer, Christopher J. Dodd, and Arlen Specter[2] (collectively, the "Amici Members") submit this brief in support the Petitioners' request for a writ of certiorari. The Amici Members have campaigned for elected office under the current federal system of unlimited campaign expenditures and have witnessed firsthand the effects of this system on the fulfillment of elected duties and the public's faith in representative democracy. As former Governors, Lieutenant Governors, state legislators and city officials, Amicus Members understand the importance of preserving the flexibility of state and local governments to craft legislative solutions that serve compelling governmental interests.

SUMMARY OF ARGUMENT

The Court should grant Petitioners' request for a writ of certiorari to resolve a clear circuit conflict regarding the extent to which this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) permits legislative bodies to determine that campaign spending limits serve compelling governmental interests, and to craft limits that will serve those interests while preserving effective political speech.

Unlike a recent and conflicting decision of the Second Circuit, the Tenth Circuit has interpreted *Buckley* to prohibit the City of Albuquerque from enacting candidate campaign spending limits as a matter of law. This effectively reads *Buckley* to preclude any future legislative deliberation at the local level – or at the state or federal levels, for that matter –

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[2] The Honorable Senator Specter agrees that the requested writ should be granted. While he believes that campaign spending limits can be constitutional, his joining in this brief should not be construed as evincing his full agreement with its contents.

concerning whether campaign spending limits might ever be justified to protect the integrity of the electoral process, the effective functioning of representative government, and the public's faith in democracy itself. The Tenth Circuit incorrectly interpreted *Buckley* to prohibit any legislative action in this area. If the Tenth Circuit correctly interpreted *Buckley*, then *Buckley* should be reconsidered against the ensuing 28-year record of the corrosive and disruptive impact of unfettered campaign spending, and the post-*Buckley* decisions permitting legislative bodies greater flexibility to craft campaign finance systems.

ARGUMENT

I. **The Threats Posed by Unlimited Campaign Spending.** Since this Court's *Buckley* decision, campaigns for federal elected office have been conducted with strict limits on the amount of money that may be contributed by any individual to a candidate's campaign, but with no limits whatsoever on the total amounts candidates may spend on their own campaigns. As periodic participants in the federal election cycle, the Amici Members are intimately familiar with the real-world implications of this bifurcated system.

The Petitioners' description of modern-day campaign fundraising as an "arms race . . . in which each candidate feels compelled to raise the maximum amount possible to forestall the possibility of being outspent," Petition for Writ of Certiorari ("Petition") at 3, finds ample support in both the ever-rising cost of conducting campaigns for federal office and the experiences of the Amici Members. According to the Federal Election Commission, Congressional candidates spent more than $1 billion on campaigns during the 1999-2000 election cycle, up from approximately $340 million in the 1981-1982 cycle. *See* News Release, Federal Election Commission, FEC Reports on Congressional Financial Activity for 2000 (May 15, 2001), *available at*

http://www.fec.gov/press/press2001/051501congfinact/051501congfinact.html. The average House candidate spent almost $275,000, and the average Senate candidate more than $1.3 million. *Id.* According to the Center for Responsive Politics, in more than half of Congressional districts, the winner outspent the second-highest vote-getter by a factor of at least ten to one; in approximately 85 percent of districts, the winner spent at least double the amount spent by the runner-up. *See* Center for Responsive Politics, *The Big Picture: Winning vs. Spending, 2000 Cycle, at* http://www.opensecrets.org/bigpicture/bigspenders.asp?cycle=2000 (last visited Oct. 21, 2004). Similarly, winners spent at least twice as much as second-place finishers in more than half of Senate races. *See id.*

Candidates for federal elected office fully understand the correlation between total campaign expenditures and their prospects for victory. They also fully expect their competitors to amass the largest possible campaign war chests, and thus are under considerable pressure to amass even larger war chests themselves. Moreover, candidates are all too aware that, given the strict limits that federal campaign finance laws place on individual contribution amounts, they must seek out and obtain as many individual contributions as possible.

Special interests of all stripes also understand the practical challenges candidates face in financing ever-more-expensive campaigns with restricted individual contributions. It is not surprising, therefore, that the phenomenon of "bundling" has become ever more prevalent. *See* Petition at 3 & n.2. Through bundling, individuals and organizations that otherwise would be restricted in their campaign contributions are able to associate their names, and

their agendas, with large aggregations of individual contributions.[3]

Given the restrictions placed upon "soft money" contributions by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), the efforts of special interests to bundle restricted individual contributions, and to present them to current and potential makers of policy as their handiwork, should be expected to increase. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, __, 124 S. Ct. 619, 706 (2003) ("Money, like water, will always find an outlet.").[4] Moreover, if history is any indicator, there can be little doubt

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[3] In the 2002 election cycle, for example, large corporations and political interest groups alike amassed contributions in the hundreds of thousands of dollars, bundled those contributions, and presented them to the campaigns of individual candidates for the Senate, both Republican and Democrat. *See* News Release, Federal Election Commission, FEC Releases Congressional Fundraising Summary (Sept. 9, 2002), *available at* http://www.fec.gov/press/press2002/20020909canstats/20020909canstat.html. In recent Presidential races, the major party candidates have bestowed special distinction upon those able to amass significant amounts of restricted individual contributions. *See, e.g.*, Tom Humphrey, "Bush's bundlers best Kerry's collectors," *The Knoxville News-Sentinel*, Sept. 26, 2004, at A1 (describing Bush campaign's "ranger" designation for bundlers of at least $200,000, and Kerry campaign's "trustee" designation for bundlers of at least $250,000).

[4] Humphrey, *supra* n. 3 (quoting corporate CEO: "It's put more of a premium on getting money from a number of people, [b]ut basically, I think it's just a new set of ground rules that I think fund-raisers have adapted to. That's the way you play the ballgame."); Peter H. Stone, "The Return of Hard Money," *Nat'l J.*, Oct. 19, 2002 (quoting former party official and current lobbyist: "I think you'll see major corporations and trade associations do a lot of bundling.").

that special interests will increasingly use bundling as a mechanism for obtaining access to, and seeking influence over, makers of federal policy. Indeed, one anonymous party fundraiser was admirably candid about why, after BCRA, special interests should be expected to devote increased attention and effort to bundling: "'This law will further elevate the check raisers' . . . . Those who are most successful in the pursuit of hard money will, like soft-money donors before them, 'get access to elected officials and administration people[.]'" Stone, *supra* n.4.[5]

The Amicus Members can attest to the difficulty of providing access to all of their constituents, as there are only so many hours in each day. In allocating those hours, the pressure to respond to the inquiries of constituents who are campaign contributors – and, in particular, to those who have the ability to secure and aggregate the restricted individual contributions of others – is inescapable. As former Senator Paul Simon aptly put it:

> I have never promised anyone a thing for a campaign contribution. But if I end up at midnight in a hotel and there are 20 phone calls waiting for me, 19 of them from names I do not recognize, the 20th is

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[5] Bundling-for-access is not a strictly federal phenomenon. *See, e.g.*, Ted Sherman, "Special-interest cash greases political wheels," *The Star-Ledger (Newark, N.J.)*, Oct. 21, 2001, at 1 (quoting local Republican party chairman in New Jersey: "I think both parties collect money from professionals; lawyers and engineers who hope to do business with the town or county. There is no secret about that"; also quoting head of county Democratic Party organization in New Jersey: "You rely on money from the traditional vendors – architects, engineers and attorneys who want to have a record of giving to the parties").

> someone who gave me a $1,000 campaign contribution – at midnight I am not going to make 20 phone calls. I might make one. Which one do you think I am going to make? The reality is you feel a sense of gratitude to people who are generous enough, and obviously wise enough, to contribute to your campaign. But it means that the financially articulate have inordinate access to policymakers.

142 CONG. REC. S6680, 6696 (daily ed. June 24, 1996) (statement of Sen. Simon on S. 1219).[6] In combination, the practical need to triage responses to constituents and the ability of some constituents to fuel the engine of unlimited fundraising create a real risk that bundlers will gain favored access to elected representatives.

The need for elected officials to amass ever-increasing campaign war chests not only creates an environment of preferred special-interest access, but also makes it increasingly difficult for elected officials to attend to the duties they have been elected to fulfill. The Amici Members can attest that time spent collecting as many limited individual contributions as possible is a significant imposition upon time that otherwise could be spent doing the critical work of Congress. Members cannot be on the floor participating in the marketplace of ideas when they are away from Washington competing in the marketplace for campaign funds. History has demonstrated that both Member attendance and the length of the legislative

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[6] *See also* 142 CONG. REC. S377, 384 (daily ed. Jan. 25, 1996) (statement of Sen. Bradley on S. 1528 & S.J. Res. 47) ("Congress, except in unusual moments, will inevitably listen to the 900,000 Americans who give $200 or more to their campaigns ahead of the 259,600,000 who don't.").

workweek have decreased as aggregate campaign expenditures have increased.[7] Accordingly, the race for unlimited campaign funds has a fundamentally distorting and disruptive impact on the core functioning of representative democracy. Although bundling helps relieve the time pressures Members of Congress face, it undermines another vital governmental interest by exacerbating the perception of preferred special-interest access.

The concerns expressed by the Amici Members in this brief are not new. Since *Buckley*, at least 15 pieces of legislation have been introduced on the floor of the House or the Senate to address the risks presented by unlimited campaign spending.[8] In floor debate on these bills, Members

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7 *See* 147 CONG. REC. S2853, 2863 (daily ed. Mar. 26, 2001) (statement of Sen. Hollings on S.J. Res. 4) ("There is no doubt that our current campaign finance system has bred absenteeism in the Senate chamber. We no longer arrive to work at 9 o'clock in the morning on Monday and struggle to close shop by 5 o'clock in the afternoon on Friday like we once did. Now on Monday and on Tuesday morning, there is no real floor debate because so many people are out raising money. On Wednesdays and Thursdays, we request time windows so that we can do more fund raising. And then as soon as Friday rolls around, we bolt from the starting blocks for another leg in the money race. If curing this sickly system isn't in the governmental interest, then I don't know what is.").

8 *See* S. 1684 & S. 1185 (98th Congress); S. 59 (99th Congress); H.R. 2473 (100th Congress); H.R. 1456 (101st Congress); H.R. 3571 & H. Res. 168 (103d Congress); H.R. 3651 & H.R. 3658 (104th Congress); S. 1057, H.R. 77, H.R. 243, H.R. 1366, H.R. 3851 (105th Congress); S. 1502 (106th Congress). In addition, numerous resolutions have been introduced seeking to amend the Constitution explicitly to permit reasonable expenditure limits in campaigns for federal elected office. *See* S.J. Res. 313 (99th Congress); S.J. Res. 21 & S.J. Res. 282 (100th Congress); S.J. Res. 48 (101st Congress); S.J. Res. 35 & S.J. Res. 60 (102d Congress); S.J. Res. 10 & S.J.

of Congress have repeatedly noted the pressures to provide favored access to the special interests that fund the feeding frenzy of unlimited election spending.[9] Members also have

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Res. 37 (103d Congress); S.J. Res. 18 (104th Congress); S.J. Res. 2, S.J. Res. 18 & H.J. Res. 119 (105th Congress); S.J. Res. 6 (106th Congress); S.J. Res. 4 & S.J. Res. 33 (107th Congress); S.J. Res. 5 (108th Congress).

[9] *See* 131 CONG. REC. S74 (daily ed. Jan. 3, 1985) (statement of Sen. Goldwater on S. 59) ("Mr. President, my concern is that unchecked, runaway campaign spending is corrupting the political process by making candidates vulnerable to special interest influence and creating the impression of undue influence even where it may not exist."); 143 CONG. REC. S2379, 2380 (daily ed. Mar. 18, 1997) (statement of Sen. Byrd on S.J. Res. 18) ("The American people believe that the way to gain access and influence on Capitol Hill is through money. And the American people are exactly right. The way to gain access on Capitol Hill, the way to get the attention of Members of this body is through money."); 145 CONG. REC. S10391, 10395 (daily ed. Aug. 5, 1999) (statement of Sen. Reed on S. 1502) ("I believe that the biggest culprit fueling the public perception that politicians, political parties and representational government is beholden to special interests, not the needs of the average citizen, is our campaign financing system. When politicians depend upon wealthy special interests, which represent less than one percent of the citizenry, for the political contributions that fuel campaigns the public is left to conclude that its voice will not, cannot, be heard, never mind addressed."); 147 CONG. REC. S2853, 2877 (daily ed. Mar. 26, 2001) (statement of Sen. Biden on S.J. Res. 4) ("I defy anyone to look me in the eye and say they believe all this additional money in the electoral process is not polluting and corrupting the process. It puts honorable young women and men . . . who are getting into the process in the position of shaving their views very nicely before they get there. No one is going to pay them off, but they are not stupid."); 148 CONG. REC. S1991, 1992 (daily ed. Mar. 18, 2002) (statement of Sen. Feingold on BCRA) ("Every day Members of Congress accept huge campaign contributions with one hand and vote on issues affecting

repeatedly warned of the potential for neglect of elected duties presented by the pressure to amass enormous campaign funds.[10]

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their contributors with the other. And, every day the public naturally questions whether their Representatives are giving special treatment to the wealthy interests that fund their campaigns and bankroll their polit ical parties.").

[10] *See* 131 CONG. REC. S74 (daily ed. Jan. 3, 1985) (statement of Sen. Goldwater on S. 59) ("[T]he demands of the fundraising treadmill will force more and more office holders to neglect their duties to patronize big donors and PAC events around the Nation. The 3-day legislative week is already becoming commonplace in Washington, DC, so that Members can escape town to fulfill the never-ending quest for campaign funds."); 142 CONG. REC. S6680, 6696 (daily ed. June 24, 1996) (statement of Sen. Simon on S. 1219) ("Frequently people who visit here, Mr. President, are astounded at the few numbers of Senators who are on the floor. I think they would be more astounded and more outraged if they knew [that] right now, this minute, there are more Senators raising money than are on the floor of the Senate . . . . It is a usurpation of the time that we ought to be devoting to issues . . . ."); 143 CONG. REC. S2382, 2383 (daily ed. Mar. 18, 1997) (statement of Sen. Hollings on S.J. Res. 18) ("This obsession with money distracts from the people's business. It corrupts and degrades the entire political process."); 144 CONG. REC. H4443, 4463 (daily ed. June 10, 1998) (statement of Rep. Gephardt on H.J. Res. 119) ("The Founding Fathers . . . certainly could not have imagined the non-stop fundraising carousel that candidates must ride in order to run for office."); 147 CONG. REC. S2853, 2856 (daily ed. Mar. 26, 2001) (statement of Sen. Hollings on S.J. Res. 4) ("We can't get any work done . . . . We can't give people the time they deserve working at the job of being a U.S. Senator because we have to work at the job of staying a U.S. Senator."); *id.* at S2857 (statement of Sen. Byrd) ("It is a vicious circle that requires candidates to spend more and more time raising money and less and less time listening to the people and working for the people, once they are elected, whom they wish to represent."); *id.* at S2862 (statement of Sen. Dodd) ("I regret there

The most compelling victim of limitless campaign spending is public faith in the integrity of the political process, a faith upon which the very health of that process depends. The public cannot help but perceive corruption.[11] Former Senator Paul Wellstone articulated this well:

> I think all of us should want to change this system because I think, when we are involved in the fundraising, the perception – and I do not accuse one colleague here of any individual corruption – but the perception of people is often that we are out there raising money from this person or that person or this

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are not more Members here to engage in this debate today . . . . [P]eople are probably out holding fundraisers all across the country.").

[11] *See McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 513 (D.D.C.) (summarizing polling data showing that (1) 75 percent of Americans "believe that big contributions to political parties have at least some impact on decisions made by the federal government"; (2) 71 percent "think that members of Congress sometimes decide how to vote on an issue based on what big contributors to their political party want, even if it's not what most people in their district want, or even if it's not what they think is best for the country"; (3) 84 percent "think that members of Congress will be more likely to listen to those who give money to their political party in response to their solicitation for large donations"; (4) 68 percent "think that big contributors to political parties sometimes block decisions by the federal government that could improve people's everyday lives"; (5) 80 percent "think a Member of Congress would be likely to give special consideration to the opinion of an individual, issue group, corporation, or labor union who donated $50,000 or more to their political party"; and (6) only 24 percent "think that a member of Congress is likely to give the opinion of someone like them special consideration"), *aff'd in part and vacated in part*, 540 U.S. 93, 124 S. Ct. 619 (2003).

> PAC or that PAC, and people just simply lose confidence in the political process. All of us who care fiercely about public service, all of us who care fiercely about good politics, all of us who are proud to serve in the U.S. Senate ought to be concerned about the fact that people have lost confidence in this process.

142 CONG. REC. S6680, 6689 (daily ed. June 24, 1996) (statement of Sen. Wellstone on S. 1219).[12] The Amici Members believe that, given the current state of affairs, unlimited campaign spending should no longer be deemed a constitutional necessity, if it ever was.

II. **The Albuquerque Experiment with Limited Campaign Spending.** The City of Albuquerque, New Mexico amended its charter in 1974 to limit candidate expenditures on campaigns for city office to the salary of the office sought, an amount that in 1999 was increased to twice the salary of the office. *See Homans v. City of Albuquerque*, 217 F. Supp. 2d 1197, 1200 (D.N.M. 2002), *aff'd*, 366 F.3d 900 (10th Cir. 2004). Ninety percent of Albuquerque voters approved the initial decision to restrict campaign spending. *See Homans v. City of Albuquerque*, 366 F.3d 900, 902 (10th

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[12] *See also* 142 CONG. REC. S9471, 9472 (daily ed. Aug. 2, 1996) (statement of Sen. Feingold) ("The voters have become inherently mistrustful of any individual elected to public office because they know that individual is now part of the Washington money chase, where their principal goal as an elected official sometimes looks like not representing their communities but, instead, raising the requisite millions of dollars for their reelection efforts."); 146 CONG. REC. S1793, 1795 (daily ed. Mar. 28, 2000) (statement of Sen. Lieberman on S.J. Res. 14) ("Money and the never ending chase for it are threatening the integrity of our political system and jeopardizing the essence of our democracy.").

Cir. 2004). In the ensuing years, Albuquerque has operated as a rare post-*Buckley* laboratory for measuring the effects of reasonable limits on campaign expenditures. The record of the Albuquerque experiment illustrates both that robust and competitive elections can flourish in the presence of carefully crafted spending limits, and that such limits can serve to enhance public faith in representative democracy.

The District Court in *Homans* found that voter turnout for the City's elections between 1974 and 1999 was approximately 40 percent, compared to an average turnout of 25 to 35 percent in cities without expenditure limits. *Homans*, 217 F. Supp. 2d at 1201. When the City's expenditure limits were temporarily suspended by court injunction in 1997, voter turnout decreased substantially. *Id.* at 1200. Despite the oft-stated concern that campaign spending limits promote incumbency, Albuquerque has *never* re-elected an incumbent Mayor since the limits were put in place, whereas 88 percent of incumbent mayors nationwide were reelected in 1999. *Id.* Many successful mayoral candidates in Albuquerque have spent far less than the maximum expenditures permitted. *Id.* at 1200-01. By contrast, in the 2001 Mayoral election, in which the expenditure limits were enjoined by the District Court, three candidates each spent far more than those limits. *Id.* at 1202, 1203.

As the District Court also found, of City voters surveyed, only 23 percent strongly believed that elections for City office are overly influenced by special-interest money, while 57 percent strongly believed that federal elections are so influenced. *Id.* at 1201. By a margin of more than two to one, the voters surveyed responded that the City's spending limits improved the fairness of elections. *Id.* at 1202. By contrast, most of the City's voters believed that removing the spending limits would increase the potential for corruption

and lead elected officials to spend more time soliciting contributions from, and entertaining the views of, special interests. Brief for Appellants at 13, *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004) (No. 02-2244). Fifty-nine percent of surveyed Albuquerque voters said they would have "less faith in the integrity of the election process in Albuquerque" if spending limits were removed. *Id.* Thus, it is not surprising that 82 percent of surveyed Albuquerque voters favored maintaining spending limits in City elections. *Homans*, 217 F. Supp. 2d at 1200-01.

III. **The Tenth Circuit's Decision and an Earlier Sixth Circuit Decision Conflict with a Recent Second Circuit Decision Holding that Vermont's Campaign Spending Limits Serve Compelling Governmental Interests.** A writ of certiorari is appropriate to resolve the conflict among the circuits over whether, after Buckley, campaign spending limits can ever be narrowly tailored to serve compelling governmental interests. Unless this conflict is resolved, legislators at the local, state, and federal levels will lack clear guidance on whether campaign spending restrictions can ever be constitutionally permissible.

The majority opinion of the Tenth Circuit on the merits of Albuquerque's spending limits (set forth in the concurrence of Judge Tymkovich) held that, in light of *Buckley*, campaign expenditure restrictions "cannot be supported as a matter of law." *Homans,* 366 F.3d at 902, 914. The court took a "quid pro quo" view of corruption – "dollars for political favors" – and reasoned that "expenditures by a candidate to promote the candidate's political agenda do not pose a particular risk of corrupting the *candidate* making the expenditure." *Id.* at 916 (citations omitted, emphasis in original). *But see McConnell*, 540 U.S. at __, 124 S. Ct. at 664 ("Our cases have firmly established that Congress' legitimate interest extends beyond preventing

simple cash-for-votes corruption to curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'") (quoting *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001)). Thus, the Tenth Circuit found "no basis to retreat from *Buckley's* essential teaching that campaign spending restrictions are not narrowly tailored to further the governmental interest in reducing corruption." *Homans*, 366 F.3d at 917.

The Tenth Circuit also rejected the other interests advanced by Albuquerque in support of the campaign spending limits – including the "preservation of officeholder time" – as "neither new nor compelling." *Id.* at 914. The court opined that "*Buckley* forecloses a finding that spending limitations can be narrowly tailored to further governmental justifications other than the anti-corruption interest sustained by the Supreme Court, no matter what evidence may be presented." *Id.* at 916. In particular, the court viewed Albuquerque's arguments concerning distraction of elected officials as indistinguishable from the interest in "controlling the costs of campaigns" rejected in *Buckley*. *Id.* at 918.[13]

By contrast, the Second Circuit recently held that *Buckley* does not foreclose the possibility that Vermont's

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[13] In reaching its decision, the Tenth Circuit explicitly agreed with the Sixth Circuit's decision in *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998). *Homans*, 366 F.3d at 914, 917, 918. Like the Tenth Circuit, the Sixth Circuit held in *Kruse* that "campaign spending limits cannot be justified by the anti-corruption rationale." *Kruse*, 142 F.3d at 915. The court also held that "the need to spend time raising money, which admittedly detracts an officeholder from doing her job, cannot serve as a basis for limiting campaign spending." *Id.* at 917.

restrictions on campaign spending might pass constitutional muster. *See Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), *pet. for reh'g en banc filed* (2d Cir. Sept. 1, 2004). The Second Circuit read *Buckley* as a decision based on the record before the Court, not a ruling "that the Constitution would always prohibit expenditure limits, regardless of the reasons asserted and the record supporting the limitations," *id.* at 107, and thus that, "like the federal expenditure limitations considered in *Buckley*, [Vermont's] expenditure limitations rise or fall on whether they have been narrowly tailored to a compelling governmental interest," *id.* at 110. Critically, the court found that Vermont's campaign spending limits served two interests that, taken together, were compelling: preventing the appearance of corruption by special interests, and the protection of the time of elected officials to interact with voters and perform their official duties. *Id.* at 124.

IV. **The Tenth Circuit Misinterpreted the Scope of *Buckley*.** *Buckley* did not forever hamstring legislators from finding that campaign spending limits serve compelling governmental interests, and from attempting to craft limits that preserve effective political speech. Rather, *Buckley* was decided on the record with which the Court was presented at the time – not the record of Albuquerque's experience, or the record of the deleterious effects of unfettered federal campaign spending in the 28 years since *Buckley* was decided. *See* 424 U.S. at 55. In particular, the Court believed the government's stated interest in preventing corruption or its appearance would be adequately served by the statute's contribution limits. *Id.* at 56-57 ("There is no indication [in the record] that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussion of such violations will be insufficient to police the contribution provisions."). The

Court also held that two other interests advanced by the government for the spending limits – equalizing the financial resources of candidates and "reducing the allegedly skyrocketing costs of political campaigns" – were legally insufficient. *Id.*

The Tenth Circuit's approach, which takes the *Buckley* Court's determinations on the record and morphs them into broad constitutional rules, is inconsistent with this Court's teachings on the scope of constitutional rulemaking and judicial review. *See McConnell*, 540 U.S. at __, 124 S. Ct. at 688 ("We have long 'rigidly adhered' to the tenet '"never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,"' for '[t]he nature of judicial review constrains us to consider the case that is actually before us.'") (citations omitted). The Tenth Circuit's approach is also fundamentally inconsistent with this Court's teachings on the nature of strict scrutiny, which is not "a straightjacket that disables Government from responding to serious problems." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996).[14]

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[14] In particular, this Court has explicitly "dispel[led] the notion that strict scrutiny is 'strict in theory, but fatal in fact,'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (citation omitted), and in fact has permitted restrictions of campaign expenditures after subjecting those restrictions to strict scrutiny, *see Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660-61 (1990) (holding that restrictions on independent corporate expenditures in political campaigns survived strict scrutiny). Because it exaggerated the *Buckley* Court's findings, the Tenth Circuit never actually subjected the Albuquerque limits to strict scrutiny. This was error.

The Tenth Circuit's reasoning, as applied to the matter before it, also undermines the invaluable role that state and local governments play in the federalist system. This Court has recognized that an important advantage of this system is that it "allows for more innovation and experimentation in government." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). By crafting campaign spending restrictions that both targeted the ills associated with unlimited spending and enhanced public faith and participation in the democratic process – and by creating a record of the results of its efforts – the City of Albuquerque has served as a laboratory for the Nation as a whole. *Buckley* should not and need not be interpreted to preclude at the outset future local or state experiments in this arena.

V. **The First Amendment Permits Legislative Bodies to Tailor Campaign Spending Limits Narrowly to Prevent the Appearance of Corruption and the Distraction of Elected Officials from Their Duties.** As discussed above, and as the Second Circuit has recognized, *Buckley* did not forever foreclose the anti-corruption and time-preservation interests as compelling in the context of campaign spending limits. If *Buckley* may be read to have done so, then it should be reconsidered.

This Court has clarified since *Buckley* that the compelling governmental interest in preventing corruption is "not confined to bribery of public officials, but extend[s] to the broader threat from politicians too compliant with the wishes of large contributors." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000); *see also McConnell*, 540 U.S. at __, 124 S. Ct. at 660. Moreover, this Court has emphasized that preventing even the appearance of corruption is a compelling governmental interest, as such an appearance "could jeopardize the willingness of voters to take part in democratic governance." *Shrink*, 528 U.S. at

390. The current system of federal campaign finance, with its limited individual contributions and unlimited campaign expenditures, has created an environment in which special interests sell bundled contributions for access, undermining the faith of the electorate in the fundamental fairness of the system. The Amici Members submit that there is no governmental interest more compelling than combating public perception that the essence of representative democracy is corrupted.

Further, there is a compelling governmental interest in ensuring that elected representatives perform the functions they have been elected to perform – an interest not only recognized by the Second Circuit as compelling in the campaign spending context, but also found compelling by this Court and other circuit courts in the context of public election financing. *See Buckley*, 424 U.S. at 96 ("Congress properly regarded public financing as an appropriate means of relieving major-party Presidential candidates from the rigors of soliciting private contributions") (citations omitted); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993). Furthermore, individual Justices of the Court have noted that protecting the time of elected officials may be a sufficiently compelling governmental interest to support campaign expenditure restrictions. *See Shrink*, 528 U.S. at 409 (Kennedy, J., dissenting) (leaving open the possibility that "Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions thus permitting officeholders to concentrate their time and effort on official duties rather than on fundraising"); *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 649-50 (1996) (Stevens, J., joined by Ginsburg, J., dissenting). Even if *Buckley* could be read to foreclose "time protection" as a

compelling governmental interest, *Buckley* was rendered "[b]efore the advent of pervasive war chests and candidate-PAC merchandising bazaars." *See* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1287 (1994).

The Amici Members have experienced firsthand the increasing difficulties faced by Congress in conducting the business of government when its individual Members must focus on waging an increasingly expensive campaign finance war.[15] Legislative bodies must retain the flexibility to combat this threat to the fulfillment of elected responsibilities.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Hon. Ernest F. Hollings	Hon. Theodore F. Stevens
Hon. Robert C. Byrd	Hon. John F. Reed
Hon. Dianne E. Feinstein	Hon. Charles E. Schumer
Hon. Christopher J. Dodd	Hon. Arlen Specter

October 25, 2004

SCOTT N. AUBY
Counsel of Record

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[15] *See* 143 CONG. REC. S2379, 2381 (daily ed. Mar. 18, 1997) (statement of Sen. Byrd on S.J. Res. 18) ("I served as majority leader from the years 1977 through 1980 and again in the years 1987 and 1988, and I served as minority leader during the 6 years in between. It was a constant problem to be a leader and to program the Senate and to operate the Senate, and became increasingly a problem because of . . . the needs of the money chase.").

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Supreme Court, U.S.
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No. 04-413

IN THE

Supreme Court of the United States

THE CITY OF ALBUQUERQUE,
a municipal corporation, *et al.*,

Petitioners,

v.

RICH HOMANS and SANDER RUE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE FANNIE LOU HAMER PROJECT, THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, THE EQUAL JUSTICE SOCIETY, THE NATIONAL BAR ASSOCIATION, THE LATINO ISSUES FORUM, AND THE GREENLINING INSTITUTE IN SUPPORT OF PETITIONERS

MARTIN R. GLICK
Counsel of Record
AMY L. BOMSE
CLAYTON T. COON
MICHAEL L. GALLO
CLARA J. SHIN
HOWARD RICE NEMEROVSKI
CANADY FALK & RABKIN
A PROFESSIONAL CORPORATION
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111-4024
(415) 434-1600

Attorneys for Amici Curiae

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

It has been forty years since the Mississippi Freedom Summer and it is almost the fortieth anniversary of the passage of the Voting Rights Act of 1965. Illustrious civil rights pioneers in organizations that file this amicus brief—Fannie Lou Hamer, Martin Luther King, Jr., Medger Evers, Roy Wilkins, Ralph Abernathy, and many others—devoted their lives to delivery of the franchise to members of our democratic society who had been effectively excluded from the political process. A series of cases in this Court decisively supported that effort and that outcome.[2]

Forty years later these organizations file this brief to make it clear that the single most important civil rights issue in American politics today is the virtual exclusion of communities of color from the political process because of the unlimited, runaway costs of campaigns for public office.[3] Influence, access

1. Pursuant to Supreme Court Rule 37.3(a), *Amici* filed this brief with the written consent of all parties. Pursuant to Rule 37.6, *Amici* confirm that no counsel for a party authored this brief in whole or in part and that no person other than *Amici* and their counsel made a monetary contribution to its preparation or submission.

2. *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *Hadnott v. Amos*, 394 U.S. 358 (1969); *Gaston County v. United States*, 395 U.S. 285 (1969); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953).

3. Despite the fact that racial minorities make up nearly 1/3 of the United States population, there are currently no black or Latino United States Senators, and only 1/6 of the United States House of Representatives are people of color. For statistics on population by race, see OVERVIEW OF RACE AND HISPANIC ORIGIN, *available at* http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf; for statistics on the racial make-up of the Congress, see MILDRED L. AMER, CONGRESSIONAL RESEARCH SERVICE, MEMBERSHIP OF THE 108TH CONGRESS: A PROFILE *available at* http://www.senate.gov/ reference/ resources/ pdf/ RS21379.pdf.

and public office are the private reserve of those who can play in this no limit game. And the interests and attitudes of those who can play are very often very different from those who are members of *Amici* organizations on issues of health care, wages, taxes, public schools, farm and factory conditions, public benefits, affirmative action, neighborhood safety, the environment and equal justice.

It is the unified position of the organizations who respectfully file this amicus brief that the single greatest obstacle to the ability of communities, municipalities, counties, states, and Congress to redress this exclusion is *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), at least as it was interpreted by the Court of Appeals in this case. The local, state, and national electorate have a strong and legitimate interest in promoting diversity, belief in the openness and fairness of government, and the absence of corruption that can be best served by contribution *and expenditure* limits carefully calibrated to respect candidates' rights to freely express their ideas and positions.

Buckley was decided in 1976. The campaign expenditure limits at issue then were struck down because the Court felt that legitimate goals could be accomplished through campaign contribution limits and disclosure only, without expense ceilings that might control speech unnecessarily and unconstitutionally. Almost no one believes that things have turned out that way.[4]

Meanwhile, in one medium-sized American city—Albuquerque, New Mexico—a system incorporating both a limit on contributions and a limit on expenditures for the grassroots positions of mayor and city council has been in

4. The 2004 election has broken all spending records. Candidates for federal office have spent $3.9 billion, a 30% increase over the $3 billion spent on federal elections four years ago. Center for Responsive Politics, *'04 Elections Expected to Cost Nearly $4 Billion* (Oct. 21, 2004 Press Release).

effect since 1974. The citizens of Albuquerque voted overwhelmingly to adopt this system. In the years that followed until the system was enjoined in 2001, the record reflects high voter participation, a high percentage of Latino candidates elected, election of candidates without access to significant resources, a very high level of confidence by Albuquerque citizens in their local elected officials and very competitive races—in four tries no incumbent mayor was reelected.

Amici are the National Association for the Advancement of Colored People, the Fannie Lou Hamer Project, the National Asian Pacific American Legal Consortium, the Equal Justice Society, the National Bar Association, The Latino Issues Forum and the Greenlining Institute (a coalition of community-based organizations of color). They are organizations dedicated to improving the quality of life and the full participation in the political system of Asian American/Pacific Islander, black, Native American, and Latino communities. *Amici* represent communities of color with the highest levels of poverty, environmental pollutants, infant mortality, and crime, as well as the lowest levels of employment, education and home ownership. *Amici* are confident that this situation can be changed and will be changed when the electoral process gives them real access to political office, to elected officials, and to meaningful campaign participation.

STATEMENT OF FACTS

A. Albuquerque Enacted Campaign Reform To Serve The Compelling Interests Of Diversity, Fair Representation And Elimination Of Corruption And Its Appearance.

In 1974, the citizens of Albuquerque, New Mexico voted to amend the City Charter, adopting a code of ethics, limits on, and disclosure of, campaign contributions and limits on campaign spending. App. 47. The ethics code and campaign financing regulations were drafted by a Charter Study

Committee and a series of public meetings were held for citizens to comment on the proposals. Rue App. 542. Under the amendments, mayoral candidates' campaign spending was limited to twice the mayor's annual salary and city council candidate's spending was limited to one year's salary. *Id.* at 561. The amendments were endorsed by both the Democratic and Republican parties and by interest groups including the League of Women Voters, the Chamber of Commerce and the League of United Latin American Citizens. *Id.* at 570–71.

Like the national campaign finance reforms adopted by Congress in 1972 and amended in 1974, Albuquerque's amendments were born out of a sense of the growing influence of money on elections. Albuquerque's local paper proudly described the amendment to the City Charter as "what may well be the strongest election code and code of ethics found in any city anywhere." *Id.* at 550.

In limiting campaign spending, Albuquerque's voters sought to free candidates from becoming beholden to the agendas of their financial supporters. Hester Eastham, a member of the Charter Study Committee, explained:

> [T]he campaign limits give everyone an equal chance. Any legitimate candidate should be able to raise the amount the committee set. It's an equalizing factor between the poor and the wealthy. (*Id.* at 549)

Albuquerque voters endorsed the amendments in the belief that campaign spending limits would reduce corruption and enable a wider variety of potential participants to enter the fray without compromising the "best interest of the people, the community and the government" to the interests of contributors. *Id.* at 561.

In 1976, this Court struck down certain aspects of the Federal Election Campaign Act, including spending limits. *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*). But Albuquerque's charter was not challenged until 1995 and not permanently enjoined until 2001, making its long experience with spending-controlled city elections a unique phenomenon in this country. App. 47–48. The District Court in *Homans v. City of Albuquerque* found that "[71% of city voters] believe that spending limits improve the fairness of elections by ensuring that ordinary citizens, not just the very wealthy, can run for office in the City without having to raise so much money from special interest groups." *Id.* at 51.[5]

The record supports the voters' perception that Albuquerque has benefited from a more diverse leadership since the enactment of campaign spending limits. Marion Cotrell, a city council member from 1974 to 1981 and president of the city council from 1980–1981, testified that "the Council had a considerably different complexion in terms of financial capabilities from what we had been seeing." Rue App. 755. Mr. Cotrell also noted that minorities were better represented on the Council after 1974. *Id.* at 756. According to city records, three of the six mayors and at least

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5. Voter turnout is higher in Albuquerque than in comparable cities. Average turnout as a percentage of registered voters for city elections was 40.2% from 1974 through 1999. Homans App. 318. Published data for city elections across the country indicate an average turnout of 25% to 35%. But Albuquerque holds municipal elections in years that do not coincide with presidential and congressional elections; in such off-years turnout is almost always low. *Id.* While data are scarce, it was noted that off-year turnout in 1987 in Pasadena and Sacramento—two cities of similar size to Albuquerque—was 30% and 33% respectively. *Id.* at 318–19. Albuquerque turnout was as high or higher than in any city holding elections in national election off-years. *Id.* at 319. In the one previous year that the campaign expenditure limit was enjoined (1987), turnout was the lowest in the entire period, at 33%. *Id.*

one-third of the council members elected were Latino.[6] Elected officials were socioeconomically diverse as well. City council members' occupations have ranged across a broad spectrum including Vincent Griego, a manager of the county motor pool repair service, and Tim Kline, a police officer. *Id.* at 721.

Albuquerque has had significantly more competitive races than comparable cities. Indeed, in mayoral elections, none of the four incumbents who have run since 1974 have been successful. Homans App. 317. By contrast, nationally, in 1999, incumbent mayors won 88% of their races and in 2000, incumbents won 126 out of 140 elections. *Id.* In Albuquerque, 71% of incumbent city council members were successful, compared to a national city council re-election rate of 86% between 1988 and 1996.[7] *Id.* at 317–18.

B. The Unparalleled And Increasing Importance Of Campaign Fundraising Drowns Out The Voice Of The Less Affluent And Communities Of Color.

As has been well documented, running for office has become an extraordinarily expensive undertaking. In the 2002 and 2004 election cycles, candidates for the U.S. Senate and House of Representatives have raised nearly two billion dollars. CENTER FOR RESPONSIVE POLITICS, 2004 ELECTION

6. Proposition 2 also adopted election by district which also contributed to the diversification of the council post-1974.

7. Who gets elected is but one measure of competitiveness. Between 1968 and 1995, 40% of New Mexico *legislative* races (where there is no spending limit) were uncontested. *See* Homans App. 318. In only 30% of them was the margin of victory 20% or less. *Id.* By contrast, all of the Albuquerque mayor races since 1974 were contested, and the average margin of victory was 5.4% in the first round and 7.4% in the run-off election. *Id.* at 317. Data in the record for city council races was for the ten-year period from 1989 to 1999. In that time only 14.8% of these were uncontested (4 of 27), and 63% (over double the rate for the state legislature) had a winning victory margin of under 20%. *Id.*

OVERVIEW: STATS AT A GLANCE.[8] The 2004 presidential race is also the most expensive in history, with both parties' nominees forgoing public funding in the primary and raising nearly $650 million between them. *Id.* In 2002, the average winning candidate for the United States House of Representatives raised nearly $1 million; the average winning candidate for the Senate raised over $5.2 million. *Id.*

Although more attention has been focused on federal election spending, there is big money in state government politics too. A study by a nonpartisan, nonprofit organization, The Institute on Money In State Politics, compiled nationwide data on the 2000 state legislative and gubernatorial elections. THE INSTITUTE ON MONEY IN STATE POLITICS, 2000 STATE ELECTION OVERVIEW (Aug. 2002). The study showed that candidates running for a House seat raised an average of $46,123; their Senate counterparts raised over twice that amount, an average of $100,976. *Id.* at 6. The fifty-nine major party gubernatorial candidates spent a combined $115.3 million—an average of nearly $2 million per candidate. *Id.* at 8.

More significant than the bare numbers, however, is the direct impact that the ability of a candidate to raise money has on his or her chances of winning. In the 2002 Congressional primaries, candidates who raised the most money won in nine out of ten races. ADAM LIOZ, U.S. PIRG EDUCATION FUND, LOOK WHO'S NOT COMING TO WASHINGTON: QUALIFIED CANDIDATES SHUT OUT BY BIG MONEY 7 (Jan. 2003) (hereafter "PIRG Study"). In the general elections, 94% of the biggest fundraisers emerged victorious. *Id.* Incumbents raised vastly more money than their challengers and were extraordinarily successful: 98% of House incumbents were reelected and 85% of Senate incumbents were reelected. CENTER FOR RESPONSIVE POLITICS, THE BIG PICTURE: INCUMBENT ADVANTAGE.[9] At the state level in 2000, 83% of the

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8. *At* http://www.opensecrets.org.

9. *At* http://www.opensecrets.org.

winning candidates raised the most money in their race. 2000 STATE ELECTION OVERVIEW, *supra*, at 4. Where the top fundraiser was also the incumbent, the chances of winning rose to 92%. *Id.* The thirteen winning gubernatorial candidates outspent their opponents by an average of $1.2 million (on average winners raised $4.1 million, and losers $2.9 million). *Id.* at 8.

Candidates who lack personal wealth[10] or access to networks of wealthy donors, or whose positions do not appeal to large contributors, are unable to compete. A 2003 survey by the U.S. PIRG of federal candidates in the 2002 election cycle who dropped out of races, lost primaries or lost general elections shows how credible candidates, including many candidates of color who are committed to representing communities in great need of representation, are unable to raise the funds necessary to compete.[11] The imperative to raise thousands of dollars gives

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10. Nearly 43% of the incoming freshman Members of Congress in 2002 were millionaires, compared with 1% of the U.S. voting age population. PIRG Study, *supra*, at 6.

11. Nathaniel Stampley, a pastor in Wisconsin, decided to run because there had never been an African-American Congressman from Wisconsin. PIRG Study, *supra*, at 41. Dr. Stampley raised $7,000 and garnered over 28% of the vote in the primary. *Id.* at 42. His opponent, incumbent Jerry Klezczka, raised $459,000. *Id.* Ben Allen, an African-American attorney, teacher and state representative in Georgia, put in $20,000 of his own money and raised another $5,300. *Id.* at 17. Although he made it to a run-off, the winner, Charles "Champ" Walker, outspent Allen by $300,000. *Id.* at 18. Leo Martinez, the son of Mexican laborers, lost the Second District Republican primary in New Mexico. *Id.* at 30. Martinez ran a grass-roots campaign and raised $18,000 but lost to the top money raiser. *Id.* Gary Collins, a lawyer and member of the Executive Committee of the Middlesex County NAACP, dropped out of the primary for the Second District in Connecticut. *Id.* at 15. Mr. Collins recounted the story of an African-American woman who came up to him in the street after hearing him speak and handed him $2 dollars in change from her purse to support his campaign. Mr. Collins concluded, "She believed in me enough to want to give me that money, but she didn't understand that even if everyone in town gave me $2 in change, that's not going to get you there." *Id.* at 16.

a very small segment of the population capable of writing very large checks an oversized role in determining who will be elected. In the 2002 election, less than one-quarter of one percent of the voting age population of the United States made a contribution of more than $200 to a congressional candidate. ADAM LIOZ, U.S. PIRG EDUCATION FUND, THE ROLE OF MONEY IN THE 2002 CONGRESSIONAL ELECTIONS 15 (July 2003). Less than one-tenth of one percent of the population made a contribution of $1,000 or more. *Id.* And yet this handful of large donors contributed over three-quarters of the individual contributions to congressional candidates. *Id.* at 16–17.

The donors who fund these expensive races are an elite group whose demographics bear little relationship to the country at large. This was the conclusion of a nationwide survey of over 1,000 donors who gave at least $200 to congressional candidates in the 1995–96 election cycle. John Green et al., *Donor Dissent: Congressional Contributors Rethink Giving*, 11 PUBLIC PERSPECTIVE 29 (2000).[12] The study also identified an additional list of "most active donors"—donors who gave money to at least eight candidates and/or gave at least $8,000. *Id.* at 29–30. The researchers concluded that "donors to House and Senate candidates are disproportionately drawn from advantaged social and economic groups." *Id.* at 30. Nearly 80% of the donors surveyed had annual incomes of over $100,000, and over 80% were college graduates. *Id.* Among the most active donors, over half had annual incomes of over $500,000, and only four percent had annual incomes of less than $100,000. *Id. However, the single most common characteristic among donors—regardless of whether they were regular donors or the most active—was race:* 99% of the donors were non-

12. This survey was conducted by professors and doctoral students at the University of Maryland, the University of Akron and Georgetown University and is available at www.georgetown.edu/faculty/wilcoxc/joyce.htm.

Hispanic white. *Id.* Similarly, a recent study of donors to the 1972, 1988 and 2000 presidential primary campaigns by Clyde Wilcox, Professor of Government at Georgetown University, found that among donors of $200 or more, 86% had incomes over $100,000, and approximately 96% of these donors were non-Hispanic white. Clyde Wilcox, *Individual Donors in the Presidential Nomination Process*, Tables 2 and 3 *in* THE CHANGING DONOR? INDIVIDUAL CONTRIBUTORS IN PRESIDENTIAL ELECTIONS 1972–2000 (Alexandra Cooper et al. eds., forthcoming).

Minorities are left out of this critical political arena because making significant contributions requires a degree of disposable income that few minorities possess. Despite the gains of the civil rights movement, the racial gap in family income has remained constant over the past twenty years. MICHAEL A. STOLL ET AL., AFRICAN AMERICANS AND THE COLOR LINE (The American People Census 2000 Series 2004). Minorities have significantly lower incomes than non-Hispanic whites. In 2000, median annual family income in the United States was $52,000 and the same figure for black family income was $31,000. *Id.* at 13. Put another way, the median black family in 2000 had an income equal to the national median in 1965.

The gap in wealth between non-Hispanic whites and minorities is even more striking. A new study from the Pew Research Center finds that between 1996 and 2002, the median black and Hispanic household wealth declined by 27%—while the median non-Hispanic white household wealth increased by 2%. RAKESH KOCHAR, PEW HISPANIC CENTER, THE WEALTH OF HISPANIC HOUSEHOLDS: 1996–2000 AS OF 2002 2 (Oct. 2004). The median white household wealth was $88,651—nearly fifteen times that of the median black household wealth, which was $5,988, and eleven times that of the median Hispanic household wealth, which was $7,932. *Id.*

Public Campaign, a nonpartisan public interest organization, has studied the relationship between campaign money and race. In its most recent study, *Color of Money: 2003*, Public Campaign organized by donors' ZIP code more than $2 billion in individual contributions of more than $200 to federal candidates, parties and Political Action Committees during the 2000 and 2002 election cycles. PUBLIC CAMPAIGN, COLOR OF MONEY: 2003 1 (Major Findings) (2003). Public Campaign then compared these data with data from the 2000 U.S. Census on race, ethnicity and income by ZIP code, using ZIP codes as the bridge between information on campaign contributions (which does not include race or ethnicity of donors) and the census data.

Public Campaign's analysis shows that neighborhoods comprised mostly of people of color are severely underrepresented in the campaign finance system. Nearly 90% of the more than $2 billion contributed by individuals in the two most recent federal elections came from ZIP codes that are majority non-Hispanic white ($1.7 billion—85%—came in the form of contributions of $1,000 or more). In comparison, just 2.8% of campaign funds come from predominantly African-American ZIP codes, 1.8% from predominantly Latino ZIP codes, and .6% from predominantly Asian Pacific-American neighborhoods. *Id.* at 2.

The top contributing ZIP code nationwide—10021 on Manhattan's Upper East Side—is 86% non-Hispanic white, and nearly 40% of its households have incomes of over $100,000. Strikingly, this one ZIP code contributes more campaign cash than the 532 ZIP codes nationwide with the largest percentage of African-American residents (representing 7,654,609 people ages 18 and over, 84 times more people than live in 10021); the 533 ZIP codes nationwide with the largest percentage of Latino residents (representing 9,355,643 people ages 18 and over, 102 times more people than live in 10021) and the 167 ZIP codes nationwide with the largest percentage of Asian Pacific-American population (representing 3,523,852 people ages 18 and over, 39 times more people than live in 10021). *Id.* at 2.

It is lack of money, not lack of interest, that creates the disparity in political contributions. In a landmark "Citizen Participation Study," Sidney Verba, Professor of Government at Harvard University, Kay Lehman Schlozman, Professor of Political Science at Boston College, and Henry Brady, Professor of Political Science at the University of California, Berkeley, conducted a large-scale, two-stage scientific survey of the voluntary activity (political, charitable and religious) of the American public. The first stage was a random telephone survey of 15,000 people, including 1,400 African-American and 894 Latino respondents. This stage was followed by in-person interviews of 2,517 of the original 15,000 respondents, with a weighted sample including 477 African-Americans and 370 Latinos. Sidney Verba et al., *Race, Ethnicity, and Political Participation in* CLASSIFYING BY RACE 354, 355–56 (Paul E. Peterson ed., 1995). The study found that differences in levels of activity between whites and non-whites were far less sharp where the activity involved time rather than money. *Id.* at 467–69.[13]

Thus, the evidence demonstrates first, and unsurprisingly, that the most affluent members of American society are vastly overrepresented in political giving and, second, that minorities, who are overrepresented among the lowest economic levels in America, are severely underrepresented among campaign donors. Economic inequality, on the rise in this country since the 1970s, paired with the escalating dependence of political leaders on campaign contributions, threatens to imperil the fundamental principle of equal representation.

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13. Another study of these data that focused on income showed that while the affluent are somewhat overrepresented in all forms of political activity, it is in the realm of political giving where the poor and lower middle class virtually disappear. *See* Sidney Verba et al., *Political Equality: What Do We Know About It?* 639–40 *in* SOCIAL INEQUALITY (Kathryn N. Neckerman ed., 2004).

LEGAL ARGUMENT

A. *Buckley v. Valeo* Does Not Stand For The Proposition That Limits On Campaign Expenditures Are Prohibited As A Matter Of Law.

Although the Tenth Circuit panel in this case thought otherwise, neither the seminal 1976 campaign finance case *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), nor any subsequent Supreme Court opinion, suggests that campaign expenditure limits are per se unconstitutional. In *Buckley*, the Court acknowledged that the problem of corruption and the appearance of corruption in electoral politics was severe enough to justify Congress in passing certain regulations that restricted First Amendment rights. *Buckley*, 424 U.S. at 26–27. *See also McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 124 S. Ct. 619, 660–66 (2003). As the Second Circuit noted in *Landell v. Vermont Public Interest Research Group*, 300 F.3d 129 (2d Cir. 2002), *affirmed in part, vacated in part, Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), "an unyielding interpretation of *Buckley* that expenditure limits are per se unconstitutional . . . would require us to ignore not only *Buckley*'s own language, but also over three decades of experience as to how the campaign funds race has affected public confidence and representative democracy." *Landell*, 300 F.3d at 144–45. In *McConnell*, the Court acknowledged Congress's long battle to "purge national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions" (124 S. Ct. at 644 (citation and internal quotation marks omitted)), through the "improvement of the national election laws." *Id.* at 645.

B. Campaign Expenditure Limits Should Now Be Considered In Light Of Post-*Buckley* Developments In Campaign Finance Regulation.

The Court, Congress, and the nation have since been taught "the hard lesson of circumvention by the entire history of campaign finance regulation." *McConnell*, 124 S. Ct. at 673. Corruption extends beyond simple *quid pro quo* arrangements

to "the broader threat from politicians too compliant with the wishes of large contributors." *Nixon v. Shrink Missouri Government PAC* ("*Shrink*"), 528 U.S. 377, 389 (2000). A government entity's legitimate interest in preventing corruption "extends beyond preventing simple cash-for-votes corruption to curbing undue influence on an officeholder's judgment, and the appearance of such influence." *McConnell*, 124 S. Ct. at 664 (citation and internal quotation marks omitted).

A large majority of voters, and especially minority voters, perceive the political process as subject to pervasive and corrupting influence by a few wealthy individuals and corporations. Members of minority groups are severely underrepresented among donors to political campaigns, and are increasingly politically marginalized as the amounts donated increase. In an America where the vast majority of campaign contributors are non-Hispanic white, communities of color perceive an endemic corruptive influence in campaign spending that, as time has proven, can only be entirely eliminated by direct restrictions on expenditures.

The District Court in this case found that the voters of Albuquerque responded to public perceptions of corruption by enacting narrowly tailored provisions specifically designed to address the corruptive influence of unrestricted campaign funds and to alleviate perceptions that such unrestricted funds amounted to undue or unfair influence by another name. This Court should uphold these restrictions as the only realistic means for furthering the City's compelling interest in combating corruption and the appearance of corruption.[14]

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14. The majority opinion in the Tenth Circuit disapproved the Albuquerque governmental interest in freeing time for officials and candidates because, the opinion stated, Albuquerque could solve the problem *by raising the limit on individual contributions*. App. 38. The Court of Appeals apparently assumed that by turning to several very large contributors the candidate can raise the necessary cash in large chunks in short order and thus save time. This approach would

(Cont'd)

C. Because Opportunity For Political Participation Among Citizens Is Fundamental To American Democracy, Protecting Diversity In The Political Arena Should Be Recognized As An Additional Basis For Reasonable Limits On Campaign Spending.

A campaign finance system without expenditure limits excludes those without the means to compete in fundraising, many of whom are members of racial minority groups. In *Grutter*

(Cont'd)
reopen a door to corruption that the court allowed legislators to close in *Buckley*. And it wouldn't work, because without limits on expenditures, the battle for money would only be waged with an even greater infusion of funds. The majority opinion below also suggested that Albuquerque candidates would save time if public funds were dedicated to city elections. *Id.* It is more than a little unrealistic, given the crunch for money felt by local governments across the United States, to require that those entities provide taxpayer funds to a very large number of candidates for city offices to further their interest in having elected officials tend to their jobs instead of constantly being involved in raising campaign dollars. Furthermore, unless public funding is linked to mandatory spending caps, public dollars will only become part of the funds collected, and the fundraising arms race will continue. Finally, the Court of Appeals posited that municipalities could (and therefore must as their only alternative to achieve their legitimate ends) impose extreme term limits, which would in turn be a time saver. *Id.* The Court of Appeals seems to be saying that if no one in office could ever run for re-election, they wouldn't spend time on re-election efforts. Do governmental entities really have to take the drastic step of never taking advantage of the knowledge and experience incumbents can bring to the job for even one extra term? This "alternative" offered to Albuquerque by the Court of Appeals also wouldn't accomplish the objective. Term limits do not preclude elected officials from running for a different office and needing to raise the funds that would allow them to qualify to compete in such contests for the new office they can legitimately seek. And non-incumbent candidates running for office would remain absorbed in the fundraising battle and still have little time or inclination to meet with the less affluent.

v. Bollinger, 539 U.S. 306 (2003), the Court recognized that government has an essential interest in promoting equal political participation by acknowledging the effects of racial discrimination in our country. "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Id.* at 332. The Court stated in *Grutter* that this compelling interest arises in part because universities, and in particular, law schools, are training grounds for many of the nation's leaders. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.*

But government's interest in promoting a visibly open path to leadership does not end at the gates of universities and law schools. The electoral process is the primary gateway to leadership in our democratic society, and the government has a vital interest in keeping that process open to all members of society. As we work together as a country to provide equal educational opportunity to minority students (and full participation at all levels in our armed forces), we undermine our accomplishments if we effectively deprive the graduates of these programs of office, of access, and of a sense that government is understanding of and receptive to their views.

The important interests of the government in promoting equal political participation have been endorsed in several cases decided by the Court. In *McConnell*, the Court acknowledged that "[p]reserving the integrity of the electoral process, preventing corruption, and sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government are interests of the highest importance." 124 S. Ct. at 696 n.88 (citation and internal quotation marks omitted). Equal political participation interests were also at stake in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), where the Court upheld a prohibition on

corporate expenditures designed to combat "corrosive and distorting effects of immense aggregations of wealth." *Id.* at 660. Indeed, the interests of the government in encouraging equal political participation are integrally related to the government interests in preventing corruption and the appearance of corruption set forth in *Buckley*. An unequal election in which only a select number of high bidders can meaningfully participate, an election that appears to be up for sale, will appear corrupt.

This Court's decisions based on the Equal Protection Clause striking down wealth barriers to voting and running for office also address the constitutional issues at stake. In *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 666 (1966), the Court invalidated a poll tax of $1.50 in Virginia state elections, declaring that "Voter qualifications have no relation to wealth. . . ." Moreover, the right of voters, regardless of wealth, to participate meaningfully in the electoral process is not isolated from the ability of candidates, regardless of wealth, to participate meaningfully as well. *See id.* In *Bullock v. Carter*, 405 U.S. 134, 144 (1972), the Court recognized the "real and appreciable impact on the exercise of the franchise" caused by a system that excludes candidates on the basis of their lack of wealth, striking down filing fees ranging from $150 to $8,900 that candidates for local office in Texas were required to pay to their political parties. The Court concluded that heightened scrutiny of such candidate filing fees was warranted because the high cost of running in a primary election would limit voter choice. As the Court noted:

> Many potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support. (*Id.*)

"[W]e would ignore reality," the Court continued, "were we not to recognize that this system falls with unequal weight on

voters, as well as candidates, according to their economic status." *Id. See also Lubin v. Panish*, 415 U.S. 709 (1974) (striking down $700 filing fee for local California election).

America's constitutional Framers recognized that "establishing a political equality among all" was a primary remedy for calling democratic representatives to account.[15] Economic barriers to full participation in the political process fall most heavily on minorities. This diminishment of minorities' rights to participate in the political process also touches on fundamental constitutional interests. Congress recognized these interests when it enacted the Voting Rights Act in response to "an upsurge of public indignation against the systemic exclusion of Negroes." H.R. REP. No. 439 (1965), *reprinted in* 1965 U.S.S.C.A.N. 2437, 2440. Prior to the Act's passage, Congress conducted lengthy hearings in which it heard from a wide variety of concerned officials and individuals. In its General Statement in support of the Act, a group of Republican Congressmen commented, "[t]he problem to which this legislation is directed is no abstract matter to those whose rights must be assured. The right to vote is of particular importance and value to minority groups in general but to our Negro citizens in particular who suffer deprivations of rights other than access to the ballot." *Id.* at 2465–66 (General Statement of Republican Views).[16]

Even as it enacted major reform, Congress predicted that given the tenacity of racial discrimination, new forms of voter discrimination would replace the existing ones:

> As we destroy the traditional bastions of discrimination erected at registration and polling

15. 14 JAMES MADISON, THE PAPERS OF JAMES MADISON 197 (Robert A. Rutland et al. eds., 1983); *see also* THE FEDERALIST NO. 57, at 305, 386 (James Madison) (J. Cooke ed., 1961).

16. In 1963, in his famous "I Have A Dream" speech at the Lincoln Memorial, Martin Luther King succinctly and with insight into what he termed "the process for gaining our rightful place" said: "We can never be satisfied as long as a Negro in Mississippi cannot vote and a Negro in New York believes he has nothing to vote for."

> places, we must foresee the path of retreat and reentrenchment of those who may continue to preserve the effects of discrimination on account of race or color. Surely it will be in the form of fraud, intimidation and corruption. . . .
>
> It is a cruel deception to give any man the elective franchise and then allow destruction of the effect of his vote through a multitude of corrupt practices. (*Id.* at 2471)

The corruption predicted in 1965—ballot stuffing and coercion of voters—was, of course, of a more virulent variety than exists today. But, there are other types of unfair influence that now beset our political system and shut out those most in need of representation. Without the ability to limit the unceasing race for funds with which they may outspend opponents, candidates for office are forced to give access and time to those who can provide money.

The Court in *Buckley* stated that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 424 U.S. at 48–49. As Justice Breyer suggested in a recent discussion of this passage, however, "those words cannot be taken literally." *Shrink*, 528 U.S. at 402 (Breyer, J., joined by Ginsburg, J., concurring). The Constitution, he points out,

> often permits restrictions on the speech of some in order to prevent a few from drowning out the many—in Congress, for example, where constitutionally protected debate, Art. I, § 6, is limited to provide every Member an equal opportunity to express his or her views. Or in elections, where the Constitution tolerates numerous restrictions on ballot access, limiting the political rights of some so as to make effective the political rights of the entire

> electorate. See, *e.g.*, *Storer* v. *Brown*, 415 U.S. 724 (1974). (*Id.* (citations omitted))

One valid basis for upholding limits on campaign expenditure limits is that "such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process. Cf. *Reynolds* v. *Sims*, 377 U.S. 533, 565 (1964) (in the context of apportionment, the Constitution 'demands' that each citizen have 'an equally effective voice')." *Id.* at 401 (citations omitted). The Court's approach should be informed by the fact that "constitutionally protected interests lie on both sides of the legal equation." *Id.* at 400.

Today what must be wholly foreign is a political system in which free speech is measured only in dollars and major segments of society are left disaffected and ultimately as powerless to influence choice of candidates and public policy as they were decades ago. If this is the teaching of *Buckley*, *Amici* urge that it be revisited and modified or overturned. Legislators and citizens by initiative can and should be permitted to balance competing and compelling government interests in diversity, absence of corruption, and broad buy-in to government with carefully drawn limits that still protect, and indeed encourage and permit, broad communication of ideas and positions. That is the system Albuquerque's citizens implemented in 1974 and *Amici* ask that it be sustained.

Respectfully submitted,

MARTIN R. GLICK
Counsel of Record
AMY L. BOMSE
CLAYTON T. COON
MICHAEL L. GALLO
CLARA J. SHIN
HOWARD RICE NEMEROVSKI
CANADY FALK & RABKIN
A PROFESSIONAL CORPORATION
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111-4024
(415) 434-1600

Attorneys for Amici Curiae

(10)

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In The

Supreme Court of the United States

THE CITY OF ALBUQUERQUE,
a municipal corporation, et al.,

Petitioners,

v.

RICK HOMANS and SANDER RUE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE SECRETARIES OF STATES OF IOWA, OREGON, NEW MEXICO AND WISCONSIN IN SUPPORT OF PETITIONERS

RICHARD E. SCHWARTZ
Counsel of Record
DANIEL T. BROWN
Of Counsel
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004-2595
(202) 624-2500

October 25, 2004

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICI*

Amici include the following Secretaries of State: Chester J. Culver of Iowa, Bill Bradbury of Oregon, Rebecca Vigil-Giron of New Mexico, and Douglas La Follette of Wisconsin.[1] *Amici* serve as the chief elections officers of their states, which gives them extensive experience with the issues raised in this case.

Amici seek review of the Tenth Circuit's decision because they believe that it is contrary to this Court's holding in *Buckley v. Valeo*, 424 U.S. 1 (1976). As the chief elections officers in their states, they are particularly concerned about the impact that the Tenth Circuit's decision will have on the ability of States and localities to enact effective reform measures sought by their citizens and legislators. Moreover, *Amici* are concerned about the detrimental impact that the split among the Tenth, Sixth, and Second Circuits will have on their efforts to enact innovative campaign finance laws. As discussed further below, the present uncertainty regarding mandatory spending limits has a chilling effect on the creativity of the State and local governments which should be serving as laboratories of democracy.

If the Tenth Circuit correctly interpreted *Buckley* as imposing a *per se* ban on mandatory campaign spending limits, *Amici* urge this Court to reconsider its holding in *Buckley* and permit Albuquerque to demonstrate that its campaign expenditure limits satisfy constitutional

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[1] The parties have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity made a financial contribution to the preparation or submission of this brief.

requirements. If such a *per se* ban truly exists as a result of *Buckley*, that ban will stifle the creativity of States and localities in this arena. As the Petitioners demonstrate, the circumstances that led this Court to enact that barrier 28 years ago have changed. This Court should reconsider the extent of First Amendment limits on campaign expenditure laws. *See* Petition for Certiorari at 26-29.

STATEMENT OF THE CASE

This case involves amendments to its city charter that the City of Albuquerque adopted in 1974. These amendments were adopted with the approval of over 90% of the city's voters. *See* Petition for Certiorari at 2. The amendments have succeeded in deterring the appearance of corruption and promoting public confidence in city government. *See id.* at 2-3. As the *Homans* District Court found, limits on campaign contributions alone have been ineffective in achieving those goals in federal elections. *Id.* at 3. Petitioner summarized additional ills attributable to the lack of spending limits in our current system of campaign finance. *See id.* at 3-4.

A split among the circuits exists on this important issue. The Tenth and Sixth Circuits have held that such a barrier exists while the Second Circuit has recently held that *Buckley* does not erect such a barrier. *See* Petition for Certiorari at 11-12. The importance of this issue is demonstrated by studies that show the current degree of cynicism among the population and diminishing voter turnout. Regardless of the actual scope of *Buckley's* holding, *Amici* urge this Court to grant the Petition and remove the cloud over the constitutionality of campaign spending limits.

REASONS FOR GRANTING THE PETITION

Amici urge the granting of the petition for three reasons. The first is the strong citizen desire for reform. That desire has expressed itself in numerous reform efforts. While some State and local legislative bodies have interpreted *Buckley* to allow mandatory campaign spending limits, the available data show that many have not enacted such limits because they believe that *Buckley* bars them. Second, this Court has recognized the benefit of allowing state legislatures – as the laboratories of democracy – to function as unfettered by judicial constraints as reasonably possible. Third, whether or not *Buckley* is correctly read to impose a *per se* barrier, declaring now that no such barrier exists will enable States and localities to address the problem more effectively because more minds will come to bear on the issue.

1. There is a strong appetite for reform and experimentation in State and local governments. This appetite has manifested itself in simple expressions of disappointment with the high cost of campaigns and the perception of corruption that flows from the realities of fundraising. This appetite is manifested in attempts to enact campaign spending limitations at the federal – and, sometimes, State and local – level.

a. The costs of elections at both the Federal and State levels have continued to skyrocket. This trend of rising costs, while evident to the *Buckley* Court in 1976, has continued to increase in the ensuing 28 years. Politicians and commentators alike believe that too much

valuable time is devoted to this ceaseless endeavor to raise funds.[2]

Politicians consider the fundraising process debilitating because it takes away time that could be spent more valuably by serving their constituents. This problem presents itself at the federal and local levels. At the state level, one study has shown that a majority of candidates for statewide office spend at least one-quarter of their time fundraising for their campaigns; nearly one-third of candidates for state legislative office are similarly preoccupied with fundraising.[3]

In addition, numerous Congressmen have recounted their fundraising experiences. For example, one Republican Senator (unnamed) admitted, "I knew Congress well before I came here, but I did not know the amount of time consumed by fundraising and how that encroaches on your ability to work here. It devours one's time – you spend the two or three years before your re-election fundraising. The

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[2] *See* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising*, 94 COLUMBIA L. REV. 1281 (1994) (stating that candidates spend too much time fundraising) [hereinafter Blasi, *Free Speech*]; *see also id.* at n.1 (citing DAN CLAWSON ET AL., MONEY TALKS: CORPORATE PACS AND POLITICAL INFLUENCE 79, 203-04 (1992); FRANK J. SORAUF, INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES 72-73, (1992); BROOKS JACKSON, HONEST GRAFT: BIG MONEY AND THE AMERICAN POLITICAL PROCESS 69, 91-92, 108 (1990); DAVID B. MAGLEBY & CANDICE J. NELSON, THE MONEY CHASE: CONGRESSIONAL CAMPAIGN FINANCE REFORM 43-45, 197 (1990); BURDETT LOOMIS, THE NEW AMERICAN POLITICIAN: AMBITION, ENTREPRENEURSHIP, AND THE CHANGING FACE OF POLITICAL LIFE 195-96 (1988); ELIZABETH DREW, POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION 96 (1983)).

[3] Paul S. Herrnson and Ronald A. Faucheaux, *Candidates Devote Substantial Time and Effort to Fundraising* (July 7, 2000), *at* http://www.bsos.umd.edu/gvpt/herrnson/reporttime.html.

other years, you're helping others."[4] Likewise, former House Majority leader Richard Gephardt has also explained that "If you have the need to raise three or four hundred thousand dollars, you're taking an enormous amount of the member's time just to raise money."[5]

The need for politicians to spend huge sums to win elections raises the perception of, and conditions for, corruption. Campaign funds come from special interest groups with legislative agendas. When politicians win elections with these funds and then continue to receive financial backing from these same special interest groups, these politicians will be under pressure to cater to these groups. *See Landell v. Sorrell*, No. 00-9159 (L), 2004 WL 1837394 (2d Cir. Aug. 18, 2004) at *20-*21. Perhaps that is why the phrase "special interest politics" has become so commonplace in our national political discourse.

Politicians routinely confirm that this problem is real. For example, former Rep. Dan Glickman (D-Kan.) admits that "[m]oney has made it more difficult for Democrats to define an economic agenda that is different from the Republican agenda; we are taking from the same contributors."[6] These very reasons are why Congress periodically

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[4] PETER LINDSTROM, CENTER FOR RESPONSIVE POLITICS, CONGRESS SPEAKS: A SURVEY OF THE 100TH CONGRESS 80 (1988).

[5] ELIZABETH DREW, POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION 51 (1983).

[6] Ken Hechier, *Financing Elections: West Virginia, the States, and the Nation*, 7 W. VA PUBLIC AFFAIRS REPORTER 3 (1990), *available at* http://www.polsci.wvu.edu/ipa/par/report_7_3.html [hereinafter Hechier, *Financing Elections*]. *See also, Free Speech and Campaign Finance Reform: Subcommittee Hearing on the Constitution Before the House Comm. on the Judiciary*, 105th Cong. Sess. 1 (1997) (attaching statement of Gene Karpinski, Executive Director of U.S. Public Interest Research

(Continued on following page)

considers solutions to free candidates from excessive fundraising obligations.[7]

b. To address this need, which is felt at the State and local levels as much as at the federal level, various State and local governments have enacted – or considered but declined to enact – campaign spending limits. Since this Court's ruling in *Buckley* in 1976, however, legislatures and legal scholars have often viewed mandatory campaign spending limits regulation as *per se* prohibited. In January 1997, Senator Arlen Specter (of Pennsylvania) commented that fundamental campaign finance reform remained impossible without overturning *Buckley*.[8] In

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Group stating "with this kind of influence accorded to big money in our political system, the candidates and the political parties will increasingly look alike on all issues of importance to moneyed interests"), *available at* http://www.house.gov.judiciary/22226.htm [hereinafter Karpinski, *Free Speech and Campaign Finance Reform*].

[7] In 1993, Members of the House of Representatives frequently commented on it. *See, e.g.*, 139 CONG. REC. H10656 (daily ed. Nov. 22, 1993) (remarks of Rep. Gejdenson); *id.* at H10665 (remarks of Rep. Harman); *id.* at H10670 (remarks of Rep. Reed); *id.* at H10671 (remarks of Rep. Hughes); *id.* at H10672 (remarks of Rep. Beilenson); *id.* at H10675 (remarks of Rep. Woolsey); Beth Donovan, *House Takes First Big Step in Overhauling System*, 51 CONG. Q. WKLY. REP. 3246, 3248 (1993); Beth Donovan, *House Will Vote on Limits Nearly $1 Million in '96*, 51 CONG. Q. WKLY. REP. 3091 (1993). *See also* Ruth Marcus & Charles Babcock, *One Day in the Fundraising Trail: Dawn to Dusk/Chasing the Dollars*, THE BOSTON GLOBE, May 16, 1997 at A1 (quoting U.S. Senator Robert Byrd of West Virginia in a March 1997 Senate floor speech: "The incessant money chase that permeates every crevice of our political system is like an unending circular marathon. And it is a race that sends a clear message to the people: that it is money, money, money that reigns supreme in American politics.").

[8] Senator Specter noted in his remarks on the floor of the Senate that a growing group of prominent legal scholars have called for the reversal of Buckley. Karpinski, *Free Speech and Campaign Finance Reform*, *supra* note 6.

(Continued on following page)

advocating for campaign finance reform, he further stated, "I believe that running for office should remain a matter of issues, tenacity, integrity and old-fashioned campaigning. Running for office should not become a simple function of money."[9]

In spite of this adversity, the appetite for reform remains strong, and State and local legislatures have attempted to adopt reforms within the constraints of *Buckley's* perceived *per se* barrier. For example, as noted by The Hoover Institution:

- Since 1990, 30 states have radically changed their campaign finance laws, 17 of them between 1995 and 1998.
- From 1972 to 1996, 45 initiatives and/or referenda, as well as charter amendments on election reform, were placed on state ballots. In 36 of these cases, a majority of voters supported enactment.
- 24 states, as of 1998, have statutes on the books providing some sort of public financing for election campaigns. Also, 12 states and New York City have some form of expenditure limitation.

Indeed, in 1993 "Congressional deliberations, opposition to campaign spending limits has most often been expressed in terms of constitutional concerns." *See* Blasi, *Free Speech*, *supra* note 2, at 1288 (citing Beth Donovan, *Constitutional Doubts Bedevil Hasty Campaign Finance Bill*, 51 CONG. Q. WKLY. REP. 2215, 2217 (1993)); Beth Donavan, *Finance by Gutting Public Funding*, 51 CONG. Q. WKLY. REP. 1534, 1539 (1993); Beth Donavan, *Constitutional Issues Frame Constitutional Options*, 51 CONG. Q. WKLY. REP. 437 (1993).

[9] *Id.*; *see also* John C. Bonifaz, Brenda Wright, and Gregory G. Luke, *Challenging Buckley v. Valeo: A Legal Strategy*, 33 AKRON L. REV. 39, 41 (1999) ("Members of Congress have introduced 11 bills since 1976 which would establish campaign spending limits for federal elections.").

- What these various states – and many municipalities – have in common is strong voter sentiment for change, harnessed by diverse grassroots coalitions and reform-minded legislators.[10]

Various state and federal polls confirm that voters are overwhelmingly in favor of more effective campaign finance reform.

- Between 1976 to 1986, campaign spending in West Virginia state Senate races increased an average of 875% from approximately $155,000 to $1,511,000. In 1986, a sample of West Virginia voters were polled regarding whether they believed "there should be a limit on how much a person can spend on running for public office." 75.5% said yes, 16.8% said no, and 7.7% were undecided.[11]

- 64% of Arizonans support public funding for campaigns (Arizona Republic poll, Oct. 2002) and 66% specifically support Clean Elections (KAET poll, June, 2002). 80% of Arizonans believe that

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[10] *Hoover Institution: Public Policy Inquiry, Campaign Finance, State and Local Overview, at* http://www.campaignfinancesite.org/structure/states1.html (last updated Sept. 20, 2004).

[11] Hechier, *Financing Elections*, *supra* note 6. In its 1990 sessions, West Virginia' s House of Delegates "passed, by a vote of 86-14, a constitutional amendment 'to amend the State Constitution to permit the Legislature to limit the amount of money which can be spent advocating or opposing a nomination or election of any candidate, or the passage or defeat of any issue, thing or item to be voted upon at public election.' The elation of supporters of the constitutional amendment, scheduled to be placed on the general election ballot in 1990, was short-lived, however. The state Senate quickly buried the amendment by double referencing it to the Government Organization and Judiciary Committees, where it died without further consideration despite frantic and repeated efforts of the secretary of state to revive it." *Id.*

> contributions influence votes on public policy (Behavior Research Center poll, December, 2001).[12]

2. At various times and in various contexts, this Court has espoused the value of deferring to the legislative process to produce creative solutions to pressing social problems. Indeed, it is a canon of this Court that such cases should be decided narrowly. *See McConnell v. Federal Election Comm'n*, 540 U.S. 93, 124 S. Ct. 619, 688 (2003). Aside from a constraint on overbroad pronouncements, the benefits to society that flow from allowing our legislatures to conduct the business of policy making through law weigh strongly in favor of clarifying that no *per se* barrier exists. As Justice Brandeis famously observed:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. . . . But in the exercise of this high power, we must ever be on guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

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[12] California Clean Election Campaign, *Arizona – Clean Elections Works! at* http://www.caclean.org/content/victories/az_works.php?path=content/victories/az_works.php&.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (dissenting opinion) *cited in Boy Scouts of America and Monmouth Council v. Dale*, 530 U.S. 640, 664 (2000) (Stevens, J., dissenting). *Cf. Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring) (the "challenging task of crafting procedures for safeguarding . . . liberty interests is entrusted to the 'laboratory' of the states . . . in the first instance.").

This Court should remove the artificial limit on States and localities imposed by a *per se* prohibition on campaign spending limits and, instead, make clear that the proper standard of review of such legislation is and will be meaningful strict scrutiny that is not "'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (Marshall, J., concurring in judgment)).

3. The current split among the circuits on this important issue demonstrates that it should be clarified by this Court. By clarifying *now* that no *per se* barrier is imposed by the First Amendment, this Court will be opening an avenue of reform to the States and localities eager to enact reform that they have avoided because of the belief that *Buckley* imposes a *per se* barrier to campaign spending limits.

Allowing the Tenth Circuit decision to stand deprives citizens who reside within that Circuit of the creativity of the State and local legislatures whose spending limits legislation would surely be struck down. This is likewise the case in the Sixth Circuit in light of the decision in *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998).

Delaying this clarification will have an impact beyond the Tenth and Sixth Circuits. The perception of a *per se*

barrier constrains the legislative process in States and localities outside of those circuits. The chilling effect that flows from the uncertainty inherent in a circuit split is further compounded by the fact that every panel of circuit judges that has considered this issue has split on the question of whether *Buckley* imposes a *per se* barrier. This effect cannot be ignored.

Amici urge this Court to grant certiorari to decide whether to free our State and local legislatures from the constraints on their ability to experiment in the realm of campaign finance reform that are the byproduct of the belief that the First Amendment imposes a *per se* prohibition on campaign spending limits laws.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

RICHARD E. SCHWARTZ
Counsel of Record
DANIEL T. BROWN
Of Counsel
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2500

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BRIEF FOR AMICI CURIAE THERESTOFUS.ORG, NEW MEXICO PUBLIC INTEREST RESEARCH GROUP, THE NATIONAL ASSOCIATION OF STATE PIRGs, COMMON CAUSE, PUBLIC CAMPAIGN, DEMOS, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, RECLAIMDEMOCRACY.ORG IN SUPPORT OF PETITIONERS

DAVID R. FINE
KELLY, HAGLUND, GARNSEY & KAHN L.L.C.
1441 Eighteenth Street,
Suite 300
Denver, Colorado 80202-1255
(303) 296-9412
Counsel for Amicus Curiae Common Cause
* Counsel of Record

DOUGLAS NAZARIAN*
PATRICIA A. BRANNAN
CHARLES S. GREENE III
JASON T. SNYDER
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
Counsel for other Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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IN THE

Supreme Court of the United States

No. 04-413

CITY OF ALBUQUERQUE, *et al.*,

Petitioners,

v.

RICK HOMANS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to United States Court of Appeals for the Tenth Circuit

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BRIEF FOR AMICI CURIAE THERESTOFUS.ORG, NEW MEXICO PUBLIC INTEREST RESEARCH GROUP, THE NATIONAL ASSOCIATION OF STATE PIRGs, COMMON CAUSE, PUBLIC CAMPAIGN, DEMOS, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, RECLAIMDEMOCRACY.ORG IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICI CURIAE

TheRestofUs.org is a non-profit, non-partisan organization whose mission is to reduce the undue influence of big money on the political process. TheRestofUs.org works to inform

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[1] Letters of consent from all parties have been filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici

and educate mainstream Americans, including those in Albuquerque, New Mexico, about the role of large donors in campaigns and the tools available to citizens and governments to create a more level playing field. Our research indicates that voters favor mandatory spending limits, such as the Albuquerque regulations, when asked what they would do to improve our political process. The organization has an interest in engaging those citizens in the reform process, and the current perception that all spending limits are per se unconstitutional presents a significant barrier to the organization's work. TheRestofUs.org hopes the Court will take this opportunity to clarify the constitutionality of limits on campaign spending. TheRestofUs.org is also a strong proponent of the citizens initiative and referendum process and believes that federal courts should use caution in examining the regulation at issue here, which was approved by 90% of Albuquerque voters, not incumbents seeking to promote campaign rules that protect their self-interest.

The New Mexico Public Interest Research Group (New Mexico PIRG) is a non-partisan citizens organization that conducts research, public education, and advocacy on a host of issues that promote the public interest of New Mexico, including environmental preservation, consumer protection, and good government. Our interests in this case are: A) New Mexico PIRG members, who are solidly middleclass, will be less likely to have their voice heard in Albuquerque politics if large campaign expenditures allow those candidates backed by wealthy interests to be much more competitive than others; B) Albuquerque citizens will have less faith in the local political process in the absence of spending limits, thereby making it harder for New Mexico PIRG to engage them in civic affairs; and C) Albuquerque voters, including New Mexico PIRG members, will be less likely to hear from

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curiae and their members or their counsel, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6.

candidates representing the full range of political viewpoints and less likely to be exposed to a robust policy debate and so will be less informed than they are under spending limits.

The National Association of State PIRGs (U.S. PIRG) represents state Public Interest Research Groups (PIRGs) at the federal level, including in the federal courts. In addition to sharing the interests of New Mexico PIRG, other state PIRGs have an interest in enacting spending limits in their states. A clarification by the Court of the circumstances in which expenditure limits are constitutional would assist the State PIRGs in advocating for comprehensive campaign finance reform.

Common Cause is a nonprofit, nonpartisan citizens organization. With approximately 250,000 members and supporters nationwide and active members and volunteers in every state, including New Mexico, Common Cause's mission is to ensure open, accountable and effective government at the federal, state and local level. Common Cause has an affiliated state organization in New Mexico and has approximately 1,600 members in the state and 600 in the city of Albuquerque. Common Cause has a longstanding concern with problems in the nation's campaign finance system, including publicly advocating for the spending limit provisions of the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 and participating in the defense of FECA before the Supreme Court.

Public Campaign is a non-profit, non-partisan organization dedicated to sweeping campaign reform that aims to dramatically reduce the role of big special-interest money in American politics. Public Campaign is laying the foundation for reform by working with a broad range of organizations, ranging from community groups, including some from the state of New Mexico, that are fighting for change in their states, to national organizations whose members are not

fairly represented under the current campaign finance system. For example, Public Campaign has worked extensively with a statewide coalition called New Mexicans for Campaign Reform (NMCR), which is a coalition of approximately 20 civic, consumer, environmental, faith-based and labor organizations dedicated to reducing the role of private money in New Mexico politics. It is our belief that more citizens of Albuquerque will run for office and become more interested in local political affairs if Albuquerque's campaign spending limits are upheld.

Demos is a non-profit organization whose purpose is to help build a society in which America can achieve its highest ideals. We believe that requires a democracy that is robust and inclusive, with high levels of electoral participation and civic engagement, and an economy where prosperity and opportunity are broadly shared and disparity is reduced. Campaign spending limits, like those adopted by Albuquerque's citizens, help foster these goals by reducing the appearance of impropriety in political campaigns and increasing electoral competition, and allowing more of the electorate's voice to be heard.

Citizens for Responsibility and Ethics in Washington (CREW) is a non-profit, non-partisan organization that through litigation enables Americans, including those from Albuquerque, New Mexico, to focus on the lack of integrity at all levels of government. CREW's aim is to encourage officials to be open about their values and act based upon their honest and best assessment of the public interest, and CREW believes that campaign-spending limits, like those approved by the Albuquerque electorate, are an effective way to accomplish this goal.

ReclaimDemocracy.org is a 501(c)(3) organization with a national membership that includes Albuquerque residents. The organization works to build a genuinely representative democracy based on the principle that each citizen's ability to influence our elections and government should result from a combination of the quality of a person's ideas and the

energy put into promoting them, independent of one's *financial status. If wealth is a determining factor in the ability* of either voters or candidates to make their voices heard in electoral races, we will have failed to meet the Constitution's promise of "equal protection of the laws." ReclaimDemocracy.org asks the Court to affirm the right of Albuquerque citizens to place reasonable limits on campaign spending in order to protect the equal protection guarantee of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

This case presents an issue of exceptional national importance: whether interests beyond those addressed in *Buckley v. Valeo*, 424 U.S. 1 (1976), can justify locally enacted campaign expenditure limits governing candidates for local office. In an effort to address on a local scale problems striking at the heart of democratic government, the citizens of Albuquerque, New Mexico, passed in 1974 a referendum limiting donations to and expenditures on behalf of candidates for city-wide office. While the expenditure limits were in force, they encouraged greater trust in the validity of local elections and fostered broader electoral competition and public participation. *See* Homans App. 234-237, 316-320, 325, 352-353.[2] Nearly 30 years later, the Tenth Circuit invalidated Albuquerque's expenditure limits based on what amounted to a "fatal in fact"[3] strict scrutiny review – an application of *Buckley* that imposed, in effect if

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[2] References to "Homans App." are to Defendant-Appellants' Appendix in the Court of Appeals.

[3] The Court has acknowledged that strict scrutiny should not be "'strict in theory, but fatal in fact.'" *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (citation omitted).

not in words, a bright-line prohibition on expenditure limits in local elections.[4]

As the Court has recognized at least since *Buckley*, unfettered campaign donations to and expenditures for political campaigns can create an appearance of impropriety and a perception that elected officials respond only to the special interests from which the money flows, thereby diminishing citizens' confidence in government and discouraging citizens from participating. *See Buckley*, 424 U.S. at 26-27, 46-47; *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 124 S. Ct. 619, 662-663 (2003); *see also Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390 (2000) ("Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance"). Campaign-finance laws enacted in the wake of *Buckley* have not stemmed the tide of huge donations and expenditures that has overwhelmed modern political campaigns. *See McConnell*, 124 S. Ct. at 661-666. But while corruption concerns affect local government as well as federal government, different interests also drive local governments' efforts to shape their electoral processes.

This Court has not, in the time since *Buckley*, had occasion to consider how and to what extent concerns other than corruption or the appearance of corruption balance the well-recognized First Amendment considerations implicated by campaign finance restrictions governing local elections. Albuquerque's experiment in campaign-finance reform represents a local solution to local problems, even if the problems are present at the state and federal level as well. *Buckley*'s standard of strict scrutiny review for expenditure limits also recognized that campaign expenditure limits could

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[4] *Homans v. City of Albuquerque*, 366 F.3d 900, 916-920 (10th Cir. 2004).

be justified by interests beyond corruption. And given the importance of these other interests to the integrity of local elections, federalism concerns warrant a different and more flexible balancing of these interests against recognized First Amendment concerns when the limitations apply solely to local elections. *Amici* respectfully request that the Court grant the City of Albuquerque's petition for a writ of *certiorari* in order to address these important issues.

REASONS FOR GRANTING THE WRIT

I. *BUCKLEY* DOES NOT PRECLUDE STATE AND LOCAL REGULATION OF CAMPAIGN EXPENDITURES.

The Tenth Circuit erroneously applied *Buckley v. Valeo*, 424 U.S. 1 (1976), effectively to preclude all limitations on campaign expenditures, including the regulation at issue here. But *Buckley* expressly left open the possibility that expenditure limits, when sufficiently tailored, can pass constitutional muster. This case presents such a possibility, and the opportunity squarely and cleanly to consider important local interests beyond the interest in avoiding corruption.

In *Buckley*, this Court examined the Federal Election Campaign Act ("FECA"), which Congress passed in order to prevent corruption and the appearance of corruption in the electoral process. *Buckley*, 424 U.S. at 26-27. Applying strict scrutiny, the Court determined that the federal government had not demonstrated a sufficiently important interest to justify FECA's expenditure limits. *See id.* at 55-58. On the record before it, the Court held that "[n]o governmental interest *that has been suggested* is sufficient to justify...[the] campaign finance expenditure limitations." *Id.* at 55 (emphasis added). The Court recognized that a sufficiently strong interest in campaign expenditure limits could outweigh relevant First Amendment concerns.

The Court has never considered the constitutionality of a purely local regulation of local election expenditures. *Buckley* related solely to a federal regulation of federal candidates and did not consider whether campaign expenditure limits for state or local elections were constitutional. No decision of this Court since has addressed expenditure limits governing state or local elections. And the analysis of Albuquerque's expenditure limits should take into account that it is a local regulation of local elections, a distinction from *Buckley* that changes the constitutional calculus in at least two ways. First, the local electorate's authority to decide how local representatives are selected represents a significant interest in its own right. Second, the smaller scale, structure and process of local government warrant a greater weighting of the interests above and beyond corruption that justify campaign expenditure limitations and temper countervailing First Amendment concerns.

II. STATE AND LOCAL REGULATION OF ELECTIONS, AND THE POWER OF STATES AND LOCALITIES TO GOVERN THEMSELVES, COMPEL A DIFFERENT (AND MORE DEFERENTIAL) BALANCING OF THE INTERESTS BEARING ON EXPENDITURE RESTRICTIONS.

The undeniable fact that expenditure limits implicate the First Amendment does not end the inquiry. First Amendment concerns must be balanced against competing constitutional concerns, *see McConnell*, 124 S. Ct. at 656 (considering competing interests such as the integrity of the electoral process), including other First Amendment concerns. In the specific case of the Albuquerque expenditure limits, a number of competing interests should be considered and balanced along with anti-corruption interests, among them (1) the local electorate's interest in governing its own elections and (2) Albuquerque's interest in protecting the integrity of its government.

Albuquerque's first obvious and fundamental interest lies in the undeniable right of its citizens to determine their own form of government and regulate their own elections. "No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution . . . the nature of their own machinery for filling local public offices." *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970).[5] The right of citizens to determine how their state and local officials are to be elected appears in the text of the Constitution, *see, e.g.*, Art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government.") (citation omitted), and has been affirmed repeatedly by this Court. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) ("the authority of the people of the States to determine the qualifications of their most important government officials . . . lies at 'the heart of representative government'" and "is a power reserved to them" by, *inter alia*, the Guarantee Clause); *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973) (a state has a "constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders").[6]

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[5] *See also Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892) ("Each state has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen."); *Duncan v. McCall*, 139 U.S. 449, 461 (1891) ("the distinguishing feature" of a republican form of government "is the right of the people to choose their own officers for governmental administration, and pass their own laws").

[6] *See also Bates v. Jones*, 131 F.3d 843, 859 (9th Cir. 1997) (Rymer, J., concurring) ("to define how the [people of California] want to be represented is a right secured to the citizens of each state"), *cert. denied*, 523 U.S. 1021 (1998); Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for*

The citizens of Albuquerque have the right to decide how to elect their representatives to city-wide office and that interest merits significant weight in any analysis of local campaign-finance regulations.[7] The Court has explained in the Fourteenth Amendment context that it "has never held that the [Fourteenth] Amendment may be applied in complete disregard for a State's constitutional powers. [R]ather, the Court has recognized that the States' power to define the qualifications of their officeholders has force even as against the proscription of the Fourteenth Amendment." *Gregory*, 501 U.S. at 468. In other contexts, the Court has calibrated the level of scrutiny to accord greater deference to local decision-making in matters falling deeply within the prerogatives of state and local officials. So, for example, the Court deferred to a state's requirement of citizenship as a qualification for certain offices because "our scrutiny will not be so demanding where we deal with matters resting firmly

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the Guarantee Clause, 65 U. Colo. L. Rev. 815, 816 (1994) ("Most scholars would agree that a republican government is, at the very least, one in which the people control their rulers."); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 41 (1988) ("The guarantee clause . . . grants states control over their internal governmental machinery.").

[7] *See* Thomas Jefferson, *Drafts of the Kentucky Resolution of 1798*, in *The Works of Thomas Jefferson in Twelve Volumes* 458, 463-464 (Paul Leicester Ford ed., G.P. Putnam's Sons, 1904) (1798). Thus it is for the States or the people "to retain to themselves the right of judging how far the licentiousness of speech and the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use should be tolerated, rather than the use be destroyed." *Id.; see also* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 222 (1998) (suggesting that the First Amendment should be treated differently when it is applied to the states under the doctrine of incorporation).

within a State's constitutional prerogatives." *Sugarman*, 413 U.S. at 648; *see also Gregory*, 501 U.S. at 462-463 (scrutiny is "less exacting" of state laws determining the qualifications of state officials). By unduly limiting the weight it accorded Albuquerque's right to govern and its interest in governing its own elections, the Tenth Circuit undervalued local interests of independent constitutional significance.

These local interests are particularly strong, and worthy of federalist deference, in cases (such as this) where voters enacted the expenditure limits by referendum. The Court has signaled the important deference to be afforded voter decisions in cases "dealing not merely with government action, but with a...provision approved by the people...as a whole." *Gregory*, 501 U.S. at 470. Justice O'Connor concluded that such provisions reflect the rational judgment of citizens who voted for the provision. *Id.*; *see also California Democratic Party v. Jones,* 530 U.S. 567, 590 (2000) (Stevens, J., dissenting) ("A State's power to determine how its officials are to be elected is a quintessential attribute of sovereignty.... In my view, principles of federalism require us to respect the policy choice made by a State's voters."); *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1098 (9th Cir. 2003) (upholding campaign finance reform initiative and explaining that "[t]he voters of Montana are entitled to considerable deference when it comes to campaign finance reform initiatives designed to preserve the integrity of their electoral process") (citing *FEC v. Beaumont*, 539 U.S. 146, 123 S. Ct. 2200, 2208-09 (2003)). Thus there can be no danger that incumbent politicians imposed Albuquerque's expenditure limit to protect their own positions.[8] The citizens of Albuquerque overwhelmingly voted for the expenditure limitation to prevent what they perceived as a threat to their

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[8] *Cf. Nixon*, 528 U.S. at 402 (Breyer, J., concurring).

control of their own elected officials. This is a judgment that the Tenth Circuit decision did not respect adequately.

A second and equally important interest supporting expenditure limits lies in the stated rationales for Albuquerque's campaign expenditure limits. Preventing actual or apparent corruption, promoting electoral competition, and reducing officeholders' time devoted to fundraising[9] – all are directed at the underlying goal of ensuring effective representative democracy, a goal that the United States, including the federal judiciary, has a constitutional obligation to help local government achieve. *See* Art. IV, § 4; *Nixon*, 528 U.S. at 401 (Breyer, J., concurring); *see generally* Mark C. Alexander, *Campaign Finance Reform: Central Meaning and a New Approach*, 60 Wash. & Lee. L. Rev. 767 (2003).

To foster effective representative democracy, the First Amendment interest of the candidate must be weighed against the integrity of the electoral process and the public's First Amendment interest in having and participating in vigorous and inclusive political debate. *See McConnell*, 124 S. Ct. at 656; *Nixon*, 528 U.S. at 400-402 (Breyer, J., concurring). The Court below failed to give sufficient weight to the First Amendment interest of Albuquerque's electorate in open public debate and equal participation. This Court has recognized Congress' goal of facilitating communication between candidates and their electorates as a valid purpose of campaign finance reform. *See Buckley*, 424 U.S. at 91; *FEC v. NCPAC*, 470 U.S. 480, 515 (1985) (White, J., dissenting).

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[9] *Homans*, 366 F.3d at 907. Apart from the competing constitutional interest of strengthening representative government, these rationales also represent valid compelling government interests justifying the restrictions imposed by Albuquerque's expenditure limits under the strict scrutiny analysis set forth by this Court in *Buckley* for federal expenditure limits. *Id.* at 908, 911-912, 913.

Today's unlimited-expenditure campaigns stifle the voices of the majority of the electorate because the bulk of campaign spending goes toward the purchase of costly broadcast media campaign speech that is controlled by a small group of wealthy contributors.[10] And as the broadcast speech drowns out other forms of expression, the ordinary electorate struggles for any effective means of raising its own issues and influencing the debate and discussion that leads to informed electoral choices.

The current system of unlimited expenditures has not protected the First Amendment's guarantee of a fair and open democratic process.[11] Modern spending levels discourage challengers from participating in the electoral process; and the resulting elimination of competition smothers meaningful discussion of political issues. *See* Homans App. 322-323, 493. Because a central purpose of the First Amendment is to encourage and protect participation in the democratic process, Albuquerque's efforts to promote speech and encourage participation through expenditure limits, thus ensuring the electorate's First Amendment rights, must be given due weight when balanced against the individual candidate's First Amendment interest in unlimited spending.

Albuquerque's interest in protecting and strengthening its own representative government outweighs *competing* First Amendment concerns. "[P]reserving the integrity of the electoral process... is [an] interest[] of the highest importance." *See First National Bank v. Bellotti*, 435 U.S. 765, 788-789 (1978). Albuquerque's expenditure limitations

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[10] *See, e.g.*, James V. Grimaldi and Thomas B. Edsall, *Super Rich Step Into Political Vacuum: McCain-Feingold Paved Way for 527s*, Wash. Post, Oct. 17, 2004, at A01.

[11] *See, e.g.*, Burt Neuborn, *Toward a Democracy-Centered Reading of the First Amendment*, 93 Nw. U. L. Rev. 1055, 1059 (1999).

promote the general constitutional objective of open and active representational democracy by allowing a broader segment of the electorate to run for office, by reducing the impression that campaigns are bought and sold by wealthy contributors, and by liberating officials and candidates from the constant need to neglect substantive matters for fundraising responsibilities.[12] For 26 years, Albuquerque's experiment with reasonable expenditure limits led to greater trust in local elections. *See* Homans App. 352, 353. Expenditure limits promoted greater competition and public participation in local elections. *See* Homans App. 234-237, 316-320, 325. "Encouraging citizens to vote is a legitimate, indeed essential, state objective; for the constitutional order must be preserved by a strong, participatory democratic process," *California Democratic Party*, 530 U.S. at 587 (Kennedy, J., concurring), and thus, the local electorate's responsibility for operating its own government, especially when combined with its interests in preserving the health of representative government, outweighs any incidental infringements on free speech from reasonable limits on local candidates' campaign expenditures.

III. THE NATURE OF LOCAL GOVERNMENT FURTHER TEMPERS CANDIDATES' FIRST AMENDMENT CONCERNS HERE.

The structure and purpose of local government vary significantly from those of the federal government. "The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes." The Federalist, No. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961). Local governments regulate land development, maintain roads, provide water and sewer services, ensure the safety of the

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[12] *See, e.g., Nixon*, 528 U.S. at 401 (Breyer, J., concurring); *id.* at 390-392; *id.* at 409 (Kennedy, J., dissenting).

community, and respond to the daily concerns of constituents. These tasks require local government officials to be more directly involved in the day-to-day minutiae of their communities than representatives to the federal government might be. Local officials focus their understanding of local needs differently and interact differently with individuals and local businesses than representatives with broader constituencies.

By design, local government officials are more acutely aware than their federal counterparts of the day-to-day local needs of local constituents. Although in theory local officials should be more accessible and devote more time to individual constituent needs than their federal counterparts, the record below reflects that an absence of expenditure limits will require many local officials to focus inordinate time on raising campaign funds in order to avoid being outspent by opponents. *See* Homans App. 206, 214. The need for unlimited campaign dollars forces elected officials to devote attention to identifying and responding to an ever-increasing number of contributors.

Local officials' intimate relationship with constituents only heightens the potential for and fallout from local corruption or the appearance of local corruption. Local government officials frequently are responsible for contracts and other forms of purchases from vendors of public services who are often major contributors to the official's campaign. In smaller geographic areas, where local officials are more likely to be connected to constituent businesses on a personal level, money poured into a candidate's war chest, even in limited amounts, may well be viewed as a *quid pro quo* when the sum of these contributions greatly outweighs other candidates' funds. This corruption or perceived corruption lessens the confidence of citizens in their local government. The citizens of Albuquerque enacted campaign expenditure limits specifically to combat this possibility, and for the other reasons noted above as well. *Cf. Nixon*, 528 U.S. at 394.

The opportunity for corruption has special significance at the local level for other reasons as well. For example, the political weight of a dollar in a local or state election may be greater than the same dollar in a federal election. *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 649 (6th Cir. 1997), *cert. denied*, 522 U.S. 860 (1997). The more money that appears in the electoral system, the greater the potential for and appearance of corruption. Moreover, local media and local political opponents may well be less able to devote scarce time and sparse resources to investigating and combating corrupt fundraising practices.[13]

If a dollar weighs more in local elections, the need for more dollars diminishes. In local elections, a smaller geographic area or a smaller number of constituents allows candidates to communicate through less expensive media than candidates for federal office. Local candidates need not undertake or finance large-scale media campaigns across multiple markets to communicate their message to voters. Because the cost of running a local election is often far less than a federal campaign, reasonable expenditure limits at the local level are unlikely to "drive the sound of a candidate's voice below the level of notice" and thus infringe on the candidate's First Amendment right of free speech. *Cf. Nixon*, 528 U.S. at 397. This plain difference in scale compels a different balancing of interests when analyzing expenditure limitations in a local election than the Court applied when analyzing the federal expenditure limits at issue in *Buckley*.

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[13] *See* Nancy Northrup, *Local Nonpartisan Elections, Political Parties and the First Amendment*, 87 Colum. L. Rev. 1677, 1681 (1987); Peter Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 Ariz. J. Intl. & Comp. L. 793 (2001).

IV. STATE AND LOCAL GOVERNMENTS NEED GREATER FLEXIBILITY THAN THE DECISION BELOW ALLOWS TO SOLVE THE PROBLEMS ASSOCIATED WITH FINANCING OF STATE AND LOCAL ELECTIONS.

Citizens have the greatest interest and the most intimate familiarity with the particular concerns of their states and localities:

> The first and most natural attachment of the people will be to the governments of their respective States. Into the administration of these a greater number of individuals will expect to rise. . . . By the superintending care of these, all the more domestic and personal interests of the people will be regulated and provided for. With the affairs of these the people will be more familiar[]. . . .

The Federalist, No. 46, at 294-295 (James Madison) (Clinton Rossiter ed., 1961). As in those early days, citizens and their local leaders are still most familiar with the issues and problems that plague their local electoral systems. Their efforts to formulate appropriate measures to secure their chosen form of government are, therefore, entitled to appropriate deference – a deference not apparent in the Tenth Circuit's analysis of Albuquerque's expenditure limits.

Our system of federalism encourages states and localities to experiment in their electoral systems to provide novel solutions to the problems associated with campaign financing. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). But the rigid application of *Buckley* has handcuffed localities and states who wish to address the problems that plague their local systems—

systems that the voters and local legislators understand far better than the federal courts. In order for local governments to protect and maintain truly representative democracies that are free from corruption, states and localities must be allowed to serve as the testing grounds for new forms of campaign finance reforms.

From the very founding of our nation, States and localities have in fact served as laboratories for innovations in government. The federal constitution was modeled after the constitutions of the individual states, and federal initiatives have often been derived from state innovations such as the extension of the vote to African-Americans, women, and eighteen-year-olds; the abolition of slavery: the direct election of U.S. Senators; workers' compensation legislation; minimum wage laws; and many significant environmental regulations. *See* Frederick Schwarz, *From the Ground Up: Local Lessons From National Reform*, 27 Fordham Urb. L. J. 5, 16-19 (1999). Even after enactment of the Bipartisan Campaign Reform Act, an extraordinary effort at comprehensive reform, the flow of large contributions to support candidates haunts elections at all levels of government across the country. *Sec* Grimaldi & Edsall, *Super Rich Step Into Political Vacuum,* Wash. Post, Oct. 17, 2004, at A01; *see also McConnell*, 124 S. Ct. at 706 ("Money, like water, will always find an outlet."). The job of reforming the broken system of campaign financing remains unfinished, and can best be achieved by allowing for innovation in local and state election systems.

The Court may have very few other opportunities to recalibrate the balance of constitutional interests bearing on campaign expenditure limits in the state and local context. Many states and localities apparently have taken *Buckley* to prohibit expenditure reforms outright[14] – an outcome the

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[14] The National Conference of State Legislatures, for example, cautions that "the court has ruled that spending limits are

Tenth Circuit's opinion only reinforces. The Vermont expenditure limits addressed in *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), *petition for rehearing pending*, are the only other state-level expenditure limits known to these *amici*, who are active participants in campaign finance legislative efforts around the country.[15] To *amici*'s knowledge, no other localities have expenditure limits in place any more.

The Court should take this case to correct the assumption, made by the Court below and many other courts, state legislatures, and local governments, that the First Amendment categorically forbids any limits on the high level of campaign spending in state and local races. With the benefit of almost 30 years of experience since *Buckley*, in Albuquerque and elsewhere, this case presents an opportunity for the Court to calibrate the important differences in the balance of constitutional considerations affecting state and local elections and to account for the appropriate role of federalism and the value of local electoral participation in the scrutiny of local governments' innovations in the pursuit of democracy.[16]

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constitutional only if they are optional." *Campaign Finance at* http://www.ncsl.org/programs/legman/about/campfin.htm.

[15] It is unclear when and if *Landell* will reach this Court. The case has been pending in the Second Circuit since the August 2000 Term, a petition for rehearing *en banc* is currently pending, and the panel opinion called for a remand for further fact finding on the expenditure limit issue.

[16] As Justice Kennedy has stated, "I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising." *Nixon*, 528 U.S. at 409 (Kennedy, J., dissenting).

CONCLUSION

For the foregoing reasons, the Court should grant the City of Albuquerque's petition for a writ of *certiorari*.

Respectfully submitted,

DAVID R. FINE
KELLY, HAGLUND, GARNSEY & KAHN L.L.C.
1441 Eighteenth Street,
Suite 300
Denver, Colorado 80202 -1255
(303) 296-9412
Counsel for Amicus Curiae Common Cause

DOUGLAS NAZARIAN*
PATRICIA A. BRANNAN
CHARLES S. GREENE III
JASON T. SNYDER
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
Counsel for other Amici Curiae

* Counsel of Record